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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 857

LOUIS B. SAPERSTEIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Louis B. Saperstein, hereby respectfully requests this Honorable Court to issue a writ of certiorari to the Court of Appeals of the State of New York to review the decision and judgment of that Court which affirmed the decision and judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, which affirmed the judgment of conviction of the Court of General Sessions of the County of New York.

Opinions Below

The opinion of the Court of Appeals of the State of New York, 2 N. Y. 2d 210, N. E. 2d , appears at page 1a of the separate Appendix to this petition. The opinion of the

Appellate Division (which discusses a question of state law only, Appendix, p. 16a), is reported in 1 App. Div. 2d 402, 150 N. Y. Supp. 2d 842.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on January 10, 1957 (Appendix, p. 11a). The jurisdiction of this Court is invoked under Section 1257(3) of the Judicial Code (Title 28 United States Code 1257, June 25, 1948, c. 656, 62 Stat. 929).

Questions Presented

1. Were the acts of the State of New York in directing and affirmatively sanctioning, by court order made pursuant to its statute, the interception by its officers, without authority of the senders, of the telephone communications of petitioner and another, and in thereafter, by compulsory process, bringing the petitioner into the State of New York from another State to testify before a grand jury as to the identity and contents of such intercepted and recorded communications, and in convicting the petitioner of criminal contempt for his refusal to identify and divulge said intercepted communications, a denial to petitioner of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

2. Do Section 813a of the Code of Criminal Procedure of the State of New York and Article I, Section 12 of the Constitution of the State of New York conflict with Section 605 of the Federal Communications Act, thereby rendering them invalid and requiring them to yield under the Supremacy Clause, Article VI, Clause 2 of the Constitution of the United States?

3. Does Section 813a of the Code of Criminal Procedure of the State of New York and Article I, Section 12 of the

Constitution of the State of New York and the ensuing enforcing, by compulsion, of the petitioner to testify with respect to the intercepted and recorded telephone communications of petitioner, constitute the making and enforcing by the State of New York of laws which abridge the privilege or immunity afforded petitioner, by Section 605 of the Federal Communications Act, in violation of the Fourteenth Amendment to the Constitution of the United States?

4. Did the granting by the Court of General Sessions of the County of New York of the respondent's motion, over the opposition of petitioner, for the trial of this case before a special jury violate petitioner's rights to due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States?

Constitutional Provisions and Statutes Involved

The pertinent constitutional provisions and statutes are set forth, *infra, pages* 23-32.

Statement

Petitioner is an insurance agent, residing and doing business in the State of New Jersey (R. 21,* Appendix, p. 25a).

The District Attorney of New York County, New York, was conducting an investigation before the November 1953 Grand Jury of insurance welfare funds of certain labor unions (R. 15-17, Appendix, p. 23a). The District Attorney had previously obtained an order and several renewal orders from a judge of the Court of General Sessions authorizing him to intercept the telephone communications

* Numbered references preceded by letter R refer to the folio numbers in the transcript of the record in the Court of Appeals.

of one George Scalise (R. 2106-2111, Appendix, p. 29a). Pursuant to such order, the District Attorney, between November 7 and November 17, 1952, intercepted and recorded five telephone communications between said George Scalise and petitioner, without the consent of either of them (R. 1493, Appendix, pp. 30a-31a).

The District Attorney, thereafter, applied for and obtained a certificate and order under the Reciprocal Witness Statute (Section 618a of the New York Code of Criminal Procedure, *infra,* p. 26) compelling the petitioner to appear as a witness before the New York grand jury (R. 849-878, Appendix, pp. 44a, 52a).

While the petitioner was a witness before the Grand Jury on March 11 and March 15, 1954, the five intercepted and recorded telephone conversations between petitioner and Scalise were played back to him by the District Attorney (R. 26, 42, 59, 75, 90, Appendix, p. 26a).

After such playback, the petitioner was questioned as to the identity, existence and contents of each of said recorded interceptions (R. 2117-2218; 2259-2278; 2304-2327; 2367-2409; 2431-2463). Typical questions asked of petitioner are set forth in the Appendix, page 36a. The petitioner's answers have been finally and conclusively determined by the State courts herein to be so equivocal and evasive as to constitute a refusal to answer the interrogatories (Appendix, pp. 2a, 28a). Since it must, therefore, be conceded that petitioner refused to answer, his answers are not printed with the questions in the Appendix.

Based on such refusal, the Grand Jury on May 13, 1954 indicted petitioner on five counts of criminal contempt under New York Penal Law Section 600, subd. 6 (*infra,* p. 31), making each telephone conversation the basis of a separate count (R. 13). Inasmuch as the five counts of the indictment are identical, except that each alleges a differ-

ent conversation, for present purposes, only the First Count is printed in the Appendix, page 23a.

On the trial, by motions to dismiss the indictment (R. 3104-3112, Appendix, p. 38a) and by requests to charge (R. 3601-3604, Appendix, p. 42a) and exceptions to the refusal to so charge the jury (R. 3555, Appendix, p. 43a) and by requests during the trial for instructions to the jury and exceptions to rulings of the trial judge (R. 1493-1507, Appendix, pp. 32a-34a), petitioner raised the questions presented numbered 1 to 3, *supra*, page 2. These questions were raised in the petitioner's briefs in the Appellate Division and the Court of Appeals. The opinion of the Court of Appeals (Appendix, pp. 2a-5a) passed on and overruled these contentions and the Court so certifies in its amended remittitur (Appendix, p. 14a).

A motion by the District Attorney for the trial of this case by a special jury was granted by the Court of General Sessions on May 25, 1954 (R. 107, Appendix, p. 55a). Petitioner opposed this motion, by affidavit, which among other objections, asserted the disadvantage to petitioner, in violation of his rights, under the United States Constitution, arising out of the investigation and keeping of records by the District Attorney with respect to the panel of special jurors as contrasted with the lack of such investigation and records with respect to the general jury panel (Appendix, p. 58a). Said records were placed in evidence on the trial to supplement and document the aforesaid objections (R. 2622, Appendix, p. 60a). Petitioner's notice of appeal specifically brought up for review the order granting a trial before a special jury (R. 9, 10, Appendix, p. 19a). In his brief in the Appellate Division (p. 69) and in his brief in the Court of Appeals (p. 61) petitioner made a specific point that "The granting by the Court of the People's motion over the opposition of the defendant, for the trial of this case, before a special jury violated the de-

fendant's rights to due process of law and equal protection of the laws under the Fourteenth Amendment to the Federal Constitution." The argument as to this question at pages 18-22 *infra,* is precisely the argument which was made in the Court of Appeals (Brief pp. 61-68). The amended remittitur of the Court of Appeals does not include this question, but, as above set forth, it was specifically raised by petitioner in all of the State courts, and the opinion of the Court of Appeals discusses this question and shows it was raised (Appendix, p. 9a).

The petitioner was convicted on all five counts of the indictment on July 2, 1954 (R. 3580-3582) and, on July 30, 1954 was sentenced by the trial judge to a term of one year on each of the five counts to run consecutively (R. 3675-3677). After the petitioner had commenced the service of his sentence on the first count, a notice of appeal was filed to the Appellate Division on August 2, 1954 (R. 7, Appendix, p. 19a). Petitioner was thereafter enlarged on bail pending such appeal (R. 110) and his bail of $5000 was thereafter continued by a judge of the Court of Appeals (R. 3711) and petitioner is still enlarged on bail.

On April 24, 1956, the judgment of conviction was affirmed by the Appellate Division (R. 3712, Appendix, p. 18a) and that Court's judgment was affirmed by the Court of Appeals on January 10, 1957 (Appendix, p. 11a). All review of the judgment of conviction and of the questions raised herein in the State courts has been concluded and said judgment of conviction is final and review of any of the questions raised is no longer open to petitioner in the State Courts of New York.

On January 23, 1956, while the appeal was pending in the Appellate Division, the District Attorney, without notice to and in the absence of petitioner and his counsel, appeared before the trial judge and moved to suspend the

execution of the sentence of petitioner on the second, third, fourth and fifth counts of the indictment. The trial judge thereupon did so (Appendix, p. 93a). Since the sentence on each count constituted a separate and distinct judgment, the sentence of one year on the first count, the execution of which had been commenced by petitioner, was not touched, the Court having no power to suspend the execution or in any way to change the sentence as to this count (*New York Code of Criminal Procedure*, Section 470a, *infra*, p. 25; *People* v. *Thuna*, 266 App. Div. 223, 225, 41 N. Y. Supp. 2d 857; *Matter of Leonard* v. *Horton*, 278 App. Div. 62, 64, 103 N. Y. Supp. 2d 55). Under New York law, the Court of original jurisdiction may, even after the judgment of conviction has been affirmed on appeal, suspend the execution of a sentence, service of which has not been commenced, and such discretion is confined to such original court and is not reviewable by the appellate courts. Such action "was not a revocation of the sentence previously imposed and the imposition of a new one. It was a suspension of the execution of judgment" (*People ex rel. Woodin* v. *Ottoway*, 247 N. Y. 493, 495, 496, 497; *Matter of Donnelly* (*Kuney*), 168 Misc. 285, 308, aff'd. 256 App. Div. 802, aff'd. 280 N. Y. 794). The Court may thereafter revoke such suspension of execution and require the defendant to serve the sentence previously imposed (New York Code of Criminal Procedure, Section 470a, *infra*, p. 25; *Matter of Donnelly* (*Kuney*), *supra*). On a separate appeal, the Appellate Division (1 App. Div. 2d 949, 150 N. Y. Supp. 2d 844, Appendix, p. 92a) held such action in the absence of petitioner or his counsel to be a nullity and remitted the matter to the Court of General Sessions for any appropriate action it wished to take on notice to petitioner. Such action by the Appellate Division had no effect on the judgments of conviction on these four counts which the Appellate Division affirmed along with the judgment of conviction on the first count

and which the Court of Appeals, in turn, affirmed and made final (Appendix, p. 11a) since any questions which the petitioner desired to raise as to the validity of his conviction were required to be and were raised on this appeal. This is so, even where the sentence was actually changed and not merely suspended as to its execution (*People* v. *Taras*, 269 App. Div. 694, 705, 53 N. Y. Supp. 2d 694, 54 N. Y. Supp. 2d 693, aff'd. 296 N. Y. 983, cert. den. 332 U. S. 818).

Reasons for Granting the Writ

I

The Court of Appeals of the State of New York has decided substantial federal questions, not heretofore determined by this Court, not in accord with applicable decisions of this Court.

Section 605 of the Federal Communications Act (*infra*, p. 24) is a substantive prohibition against unauthorized interception and divulgence of telephone communications, which is all inclusive and excepts no one from its sweep (*Nardone* v. *United States*, 302 U. S. 379, 382, 384; *Diamond* v. *United States*, 108 F. 2d 859, 860). A violation of Section 605 is a crime (Section 501, *infra*, p. 23). The prohibition embodied in Section 605 is similar to the prohibition against unlawful searches and seizures (*Nardone* v. *United States, supra*, p. 383). Accordingly, this Court has applied the same policy laid down in the search and seizure cases in formulating a rule as to the admissibility in evidence in the federal courts of the fruits of such invasion of privacy (*Nardone* v. *United States, supra; Nardone* v. *United States*, 308 U. S. 338, 339, 340, 341; *Goldstein* v. *United States*, 316 U. S. 114, 120).

Similarly, this Court, following the policy laid down in *Wolf* v. *Colorado*, 338 U. S. 25, 28, as to search and seiz-

ure, with respect to State rules of evidence, held in *Schwartz* v. *Texas,* 344 U. S. 199, 201:

> "The problem under section 605 is somewhat different because *the introduction of the intercepted communication would itself be a violation of the statute,* but in the absence of an expression by Congress, this is simply an additional factor for a state to consider in formulating a rule of evidence for use in its own courts. *Enforcement of the statutory prohibition in section 605 can be achieved under the penal provisions of Section 501.*" (Emphasis supplied.)

Since a state officer commits a federal crime in intercepting and divulging telephone communications for which he can be prosecuted in the federal courts (Cf. *Irvine* v. *California,* 347 U. S. 128, 137, 138), he can refuse to testify as to such intercepted communication and he cannot be compelled, under threat of contempt or otherwise, to do so, and thereby subject himself to prosecution under Section 501.

But if state officers wish to assume the risk of federal prosecution and divulge the illegally intercepted communication, they cannot compel a party to the conversation to join with them in their criminal violation of section 605. "The Act contemplates voluntary consent and not enforced agreement to publication" and "the interdiction of the statute was intended to prevent such a method of procuring testimony" (*Weiss* v. *United States,* 308 U. S. 321, 325, 330; see also: *Goldstein* v. *United States,* 316 U. S. 114, 118, 119, 122).

In *Harlem Check Cashing Corp.* v. *Bell,* 296 N. Y. 15, 17, the Court stated that while *Weiss* v. *United States, supra,* appeared to interpret Section 605 as a substantive prohibition against all disclosure and divulgence, that case was

concerned only with admissibility of evidence in a federal court of an intercepted message obtained by a state officer without an order under New York Code of Criminal Procedure, Section 813a (*infra*, p. 27) and that therefore the Court of Appeals was not constrained by *Weiss* to hold that disclosure and divulgence of an intercepted message recorded by tapping wires in accordance with New York Constitution Article I, Section 12 (*infra*, p. 24) and New York Code of Criminal Procedure, Section 813a (*infra*, p. 27) was illegal under Section 605 of the Federal Communications Act.

In *People* v. *Feld*, 305 N. Y. 322, 329, 330, the Court of Appeals held that the wiretaps having been made pursuant to a court order under Code of Criminal procedure, Section 813a, were valid and the evidence so obtained does not violate Section 605 of the Federal Communications Act.

In this case, the Court of Appeals reaffirmed its holding in *Harlem, supra,* and stated further that this Court "came to the same conclusion in *Schwartz* v. *Texas* (344 U. S. 199) with a flat holding that Section 605 does not operate to invalidate a State statute, such as our Section 813a of the Code of Criminal Procedure (*supra*), authorizing the tapping of wires and the receipt in evidence of the records thereof" (Appendix, p. 3a).

Schwartz v. *Texas, supra,* did not hold that a State could authorize or commit wiretapping. *Schwartz* holds that a State may, if it chooses, admit the evidence in its own courts, despite the fact that it had been illegally obtained and that the evidence itself when introduced becomes a new violation of Section 605, on the part of those introducing it.

The opinion of the Court of Appeals in this case (Appendix, p. 4a) cites *Schwartz* v. *Texas* as holding in ad-

dition, "that this rule of evidence is not affected by the circumstance that *requiring* a witness to testify might *force* him to a criminal violation of the Federal Communications Act" (emphasis supplied). *Schwartz* v. *Texas* did not so hold. It held merely that if a witness wishes to run the risk of federal prosecution by testifying in a State court, the State may let him run that risk and accept his testimony. This is not a holding that if he refuses to do so, a State can compel him to commit such federal offense. No one can be compelled to commit a crime under any circumstances.

In *People* v. *Stemmer,* 298 N. Y. 728, aff'd. by equally divided Court 336 U. S. 963, reh. den. 337 U. S. 921, also cited by the Court of Appeals, the sole question presented in the petitions for certiorari in this Court (Stemmer's petition, p. 4; Krakower's petition, p. 5) concerned the admissibility in evidence in a state court of wiretaps prohibited by Section 605.

The Court of Appeals, in this case, further states that the petitioner could not refuse to answer as to the intercepted communications because "the divulgence asked of him was not a voluntary one but under compulsion of subpoena" (Appendix, p. 4a).

If the compulsion of a subpoena requires a witness to make a divulgence forbidden by law, he not only has the right to refuse to commit a crime, but the duty to obey the restraint imposed upon him by law, and no such subpoena is valid.

Petitioner was granted immunity by the Grand Jury under Section 2447 of the New York Penal Law (*infra,* p. 31) with respect to the state offenses of conspiracy and bribery and violations of the State Insurance Law. But such State conferred immunity has no effect to and did not absolve petitioner from prosecution for a federal

crime under Section 501 of the Federal Communications Act (*infra*, p. 23), and the Court of Appeals makes no claim that it does, but, as above set forth, claims that the fact that petitioner might be forced to commit a federal crime by being required to testify does not permit him to refuse to do so.

Section 605 applies only to testimony as to conversations which are intercepted and would not likewise prohibit testimony as to unintercepted conversations as well, as the Court of Appeals purports to state in its opinion (Appendix, p. 4a). Unquestionably, a witness may testify as to his own independent recollection of a telephone conversation or as to what he overheard by means other than interception (*Irvine* v. *California, supra*, 347 U. S. 128, 131; *Goldman* v. *United States*, 316 U. S. 129, 132, 133).

But where, as was done in *Weiss* v. *United States, supra* (pp. 325, 326), a party to the conversation, who did not himself make the interception, identifies the voices in the recording made by state officers and testifies together with the recording to lay the foundation for the introduction of the recording in evidence, such testimony is a violation of Section 605 (*Weiss* v. *United States, supra* (pp. 329, 330); *James* v. *United States*, 191 F. 2d 472, 474, cert. den. 342 U. S. 948; *Goldstein* v. *United States, supra*, 316 U. S. 118, 119, 122).

II

The Denial of Due Process

In *Wolf* v. *Colorado, supra*, 338 U. S. 25, 28, this Court held that an unlawful search and seizure runs counter to the Due Process Clause (*infra*, p. 23) and were a State affirmatively to sanction such police invasion into privacy, it would run counter to the guaranty of the Fourteenth Amendment. However, said this Court, so long as a State

recognized another means of enforcing such right of privacy, it was not required to enforce it by an exclusionary rule of evidence in its State courts.

In *Schwartz* v. *Texas, supra,* dealing with unlawfully intercepted telephone communications, this Court following and applying *Wolf,* held that since the divulgence of the communication was a federal crime, a State had open to it the choice of admitting the evidence and leaving enforcement for the intrusion into privacy to federal prosecution under Section 501.

Here, the State of New York does not merely accept the fruits of the unlawful wiretaps in evidence in its courts, but it has by order of its Court, pursuant to its statute, affirmatively directed its officers to make the wiretaps and completely sanctions such invasion of privacy and contends that such interceptions are wholly legal and exempted from and not a violation of Section 605 (*infra,* p. 24; *Harlem Check Cashing Corp. v. Bell, supra; People* v. *Feld, supra;* Rulings of trial judge in this case, Appendix, pp. 33a, 43a).

Accepting the illicit fruits gathered by another, is quite different from planting the seeds to grow the forbidden fruit.

Having thus sanctioned the interceptions as its own, the State of New York then reached out into another State and, without disclosing, in its application (Appendix, p. 48a) that petitioner would be required to testify as to the recorded interceptions, compelled petitioner to come to New York as a witness before the Grand Jury (R. 849-878, Appendix, pp. 44a, 52a), thereby seeking to make petitioner a party to and an instrument in the divulgence by the state officers of the intercepted communications. Upon petitioner's resistance to this "offensive use of the intercepted messages" which "the interdiction of the statute was in-

tended to prevent'' (*Weiss* v. *United States, supra,* 308 U. S. 329, 330), petitioner was convicted of criminal contempt.

If what happened here be sanctioned, petitioner is a criminal, no matter what he does. If he answers and joins in the unlawful divulgence of the interceptions, he is guilty of violating Sections 605 and 501. If he refuses to answer, he goes to jail for criminal contempt.

Process which places a witness in this position is not due process of law. The coercion of contempt in this case was an unlawful coercion to commit a federal crime or else be punished.

Petitioner was denied the fundamental justice and fairness implicit in the Due Process Clause (*Wolf* v. *Colorado, supra; Rochin* v. *California,* 342 U. S. 165; *Adamson* v. *California,* 332 U. S. 46, 54; *Chambers* v. *Florida,* 309 U. S. 227, 236; *Lisenba* v. *California,* 314 U. S. 219, 236, 237; *Lyons* v. *Oklahoma,* 322 U. S. 596, 605; *Buchalter* v. *New York,* 319 U. S. 427, 429).

III

Section 813a, New York Criminal Code and Article I, Section 12, New York Constitution conflict with Section 605 of the Federal Communications Act and contravene the Supremacy Clause of the Federal Constitution.

Congress has the jurisdiction under its commerce power to legislate with respect to telephone communications, and this includes intrastate as well as interstate communications (*Weiss* v. *United States,* 308 U. S. 321, 327, 329; *Nardone* v. *United States,* 302 U. S. 379, 382; *Bethlehem Steel Co.* v. *New York Labor Relations Board,* 330 U. S. 767, 772). Congress has exercised such jurisdiction by enacting the Federal Communications Act (47 U. S. Code, Sections 151 *et seq.*), and in Section 605 (*infra,* p. 24), Con-

gress has enacted that "no person" shall intercept any telephone communication. The language "no person" admits of no exception (*Nardone* v. *United States, supra,* 302 U. S. 379, 382), and this includes state officers (*Schwartz* v. *Texas, supra*). Section 813a (*infra,* p. 27), in authorizing state officers, by court order, to intercept telephone communications is in conflict with Section 605, since it authorizes state officers to do what Congress in Section 605 has expressly prohibited them to do. Article I, Section 12 of the State Constitution (*infra,* p. 24) likewise conflicts with Section 605 since it authorizes *ex parte* orders or warrants for interceptions. But the constitutional provision is not self-executing, and thus it is actually Section 813a which authorizes the interceptions by state officers.

In *Schwartz* v. *Texas, supra* (pp. 202, 203), this Court makes it plain that in enacting Section 605, Congress definitely occupied this field to the extent that it prohibited unauthorized interception and divulgence by state officers and made it a federal crime, although it did not go so far as to exclude the evidence in state courts.

Where a state statute conflicts with a federal statute enacted within the field of Congressional authority and jurisdiction, the state statute is invalid and must yield under the Supremacy Clause (Art. VI) of the United States Constitution (*infra,* p. 23) (*Case* v. *Bowles,* 327 U. S. 92, 102; *Franklin National Bank* v. *New York,* 347 U. S. 373, 378; *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 474, 480; *Garner* v. *Teamsters Chauffeurs & Helpers Union,* 346 U. S. 485, 500, 501; *Railway Employees' Dept. A. F. L.* v. *Hanson,* 351 U. S. 225, 232; *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173, 176; *Kalb* v. *Feuerstein,* 308 U. S. 433, 439; *Amalgamated Association* v. *Wisconsin Employment Relations Board,* 340 U. S. 383, 393; *International Union of United Auto Workers* v. *O'Brien,* 339 U. S. 454, 459; *Savage* v. *Jones,* 225 U. S. 501, 533).

IV

Section 813a, New York Criminal Code and Article I, Section 12, New York Constitution violate the Privileges and Immunities Clause of the Fourteenth Amendment.

Privileges and immunities which owe their existence to the Federal Government, its national character, its constitution or its laws, are protected by the privilege and immunity clause of the Federal Constitution (*People* v. *Lawrence,* 390 Ill. 499, 61 N. E. 2d 361, cert. den. 326 U. S. 731; *Snowden* v. *Hughes,* 321 U. S. 1, 6; *Culp* v. *United States,* 131 F. 2d 93, 98; *Apodaco* v. *United States,* 188 F. 2d 932, 935, 936).

In *United States* v. *Polakoff,* 112 F. 2d 888, 889, cert. den. 311 U. S. 653, the Court held, per LEARNED HAND, *J.,* that each of the parties to a telephone conversation has a "privilege" which is "immune" from surrender by the other's consent, which is a "privilege created by Section 605" and that the "privilege is mutual; both must consent to the interception of any part of the talk.", and "Violation of the privilege, we are admonished, is so grave a dereliction as to be 'destructive of personal liberty' (*Nardone* v. *U. S.,* 302 U. S. 379, 383)."

Such privilege and immunity against interception is all extensive and protects against interception by anyone without consent of the senders.

By Section 813a and Constitution, Article I, Section 12 the State is attempting to abridge such absolute privilege or immunity by authorizing its officers, without the consent of the senders, to intercept such conversations. The making or enforcing of such a statute contravenes the privileges and immunities clause of the Fourteenth Amendment (*infra,* p. 23).

Likewise the right of every citizen to refuse to testify with respect to his telephone conversations which have

been illegally intercepted and recorded is a privilege and immunity granted to him by the laws of the United States (*James* v. *United States, supra,* 191 F. 2d 472, 474, cert. den. 342 U. S. 948).

V

Conflict of decisions of United States Courts of Appeals of several circuits as to interception and divulgence with consent of but one party to telephone conversation.

In this case, it was sought, by compulsion, to make petitioner an instrument and participant in the state officers' unlawful divulgence. This Court has held, in *Weiss* v. *United States, supra,* and in *Goldstein* v. *United States, supra,* that this is a violation of Section 605.

In the State courts, petitioner contended, in addition, that even if one party to a conversation voluntarily testifies in connection with the interceptions, that this would violate Section 605, since any divulgence of recorded intercepted communications without the consent of both parties to the conversation is prohibited by that Section.

As to this, the decisions of several of the United States Courts of Appeals are in conflict.

In *United States* v. *Polakoff,* 112 F. 2d 888, 889 (2nd Cir.), cert. den. 311 U. S. 653, it was held that both parties to the conversation are senders and both must consent to the interception; that the consent of one is not enough.

The New York Court of Appeals, in this case (Appendix, p. 4a) states that the *Polakoff* case is not in point, since it was not a case of divulgence by a participant, but merely a case of consent to interception. This is not a distinction. Both interception and divulgence are equally prohibited by Section 605. However, *James* v. *United States* (D. C. Cir.), *supra,* 191 F. 2d, 472, 474, cert. den. 342 U. S. 948, was a case of divulgence by a participant,

which was held to be in contravention of Section 605. See also: *United States* v. *Stephenson,* 121 F. Supp. 274, 277, 278 (D. C. D. C.); *Reitmeister* v. *Reitmeister,* 162 F. 2d 691, 694 (2nd Cir.).

The holdings of the Courts of Appeals for the Second Circuit in *Polakoff, supra,* and of the District of Columbia Circuit in *James, supra,* are in conflict with the Courts of Appeals of other circuits (*United States* v. *Bookie,* 229 F. 2d 130, 132 (7th Cir.); *Flanders* v. *United States,* 222 F. 2d 163, 165 (6th Cir.); *Pierce* v. *United States,* 224 F. 2d 281 (6th Cir.), aff'g. 124 F. Supp. 264). This conflict is also recognized in *Rathbun* v. *United States,* 236 F. 2d 514 (10th Cir.), and in *Monroe* v. *United States,* 234 F. 2d 49, 56 (D. C. Cir.), cert. den. U. S. , 1 L. ed. 2d 76.

The *Polakoff* case was cited by this Court in *Goldstein* v. *United States, supra,* 316 U. S. 114, 120 (footnote 13). In *Schwartz* v. *Texas, supra* (p. 201), this Court assumed, without deciding, that interception of a telephone communication by authorization of but one of the senders violated Section 605.

VI

The denial of due process and equal protection of the laws by reason of the trial before a special jury.

This Court said in *Fay* v. *New York,* 332 U. S. 261, 285, dealing with special juries, that the Equal Protection Clause "prohibits prejudicial disparities before the law" and that "the inquiry under this clause involves defendant's standing before the law relative to that of others accused."

In this case, petitioner makes a showing, not made in *Fay, supra* or in *Moore* v. *New York,* 333 U. S. 565, of a denial of due process and equal protection of the laws.

In New York County, in 1954, there were 58,374 jurors on the general jury panel and 2025 jurors on the special

panel (Appendix, p. 73a) drawn pursuant to Section 749aa of the New York Judiciary Law (*infra*, p. 28).

As petitioner established on the trial, the District Attorney keeps a record with respect to each juror on the special panel. This record is compiled by sending out investigators to check and report on the private lives, likes, dislikes and prejudices of each juror. In addition, each assistant district attorney makes a permanent record, for future use, of the appearance, actions, reactions and vote of each special juror in each case (R. 2623, 2624, Appendix, p. 60a). Only the records with respect to the 150 jurors on the panel for this case were disclosed. But they must be deemed to be representative of the records of the 2025 members of the panel. The records of those of the jurors on this trial panel as to whom there are reports are printed in the Appendix, at pages 74a-91a.

Plainly, the very fact that investigators from the District Attorney's office probe the private lives of prospective jurors infects a trial by such a jury with unfairness and suspicion. Who knows what is said to these jurors ~~and their~~ friends and neighbors who are visited? Who can say what use may be made of unsavory and extremely personal information turned up? (See, for example, reports on jurors John E. Davis, George M. Grennan, Ernest Tribelhorn, Jr. (Appendix, pp. 76a, 79a, 90a). Who knows what effect it has on a juror if he knows that the District Attorney has this information, or if he knows merely, as he is bound to find out, that he has been investigated? How much of a tendency will this have to cause him to strive to attain a mark on the District Attorney's report card of "Good" or even "Excellent" juror?

Jurors on the general panel are not investigated nor is any record kept as to them and they are thus not subjected to such pressures. Therefore, a defendant tried before a special jury is at a disadvantage not suffered by a

defendant tried by the general panel. In addition, in the selection of a special jury to try a defendant, the District Attorney, by possession and use of these records, has a tremendous advantage over the defendant. In the selection of and trial by a general jury, concerning which there are no investigations or records, the defendant stands even with the District Attorney and suffers no such disadvantages.

> "A system which may be constitutionally unobjectionable if applied to all, may be brought within the prohibition if some have more favorable treatment" (*Fay* v. *New York, supra*, p. 285).
>
> "In this tradition, our own constitutional guarantees of due process and equal protection both called for procedures in criminal cases which allow no invidious discriminations between persons and different groups of persons" (*Griffin* v. *Illinois*, 351 U. S. 12, 17).

At the time the District Attorney's motion for a special jury was made and petitioner's objections were filed, petitioner had no knowledge of the contents of the District Attorney's private records. The Court of Appeals, in its opinion, in this case (Appendix, p. 9a) states that the objections of petitioner were removed because, about two weeks before the trial, petitioner, to enable him on the trial to establish and document his objections previously made, demanded and received from the District Attorney an inspection of the records with respect to the 150 jurors drawn for this trial (R. 2622-2642, Appendix, p. 62a). This disclosure by the District Attorney was not made voluntarily or pursuant to any rule of law or practice, but only after petitioner had, by his demand, apprised the District Attorney that he was aware of their existence, and to forestall any claim that these private records of the District Attorney had been withheld.

A defendant, even if he possesses the names of the jurors cannot, for lack of resources, investigators and sufficient time, cause such an investigation to be made of the special jurors. Besides, if he did, he would be haled into court for contempt (Cf. *Cammer* v. *United States*, 350 U. S. 399) or prosecuted under New York Penal Law, Section 376a (*infra*, p. 30). ~~The District Attorney, however, apparently does so with impunity~~. Further, a defendant could not, as can the District Attorney, follow up the information in the reports by going back to the original sources, the investigators and assistant prosecutors who made them, for any clarifying discussion or information, which may be desirable in cases of meager or conflicting reports (see for example conflicting reports on juror Fred K. Holterman, Appendix, p. 81a).

Furthermore, the examination of the records by the petitioner could not and does not remove the impact and effect on the jurors theretofore occasioned by the District Attorney's investigation.

The record indicates clearly that this federal constitutional question was raised in all the State courts (see p. 5, *supra*). For some unexpressed reason, the Court of Appeals did not so state in its remittitur, although its opinion (Appendix, p. 9a) plainly shows it to be so. The only explanation for this, inferable from the Court's opinion, is that having held therein that the possession, before the trial, by petitioner, of the information in the District Attorney's private records overcame the constitutional objection, the Court deemed it unnecessary to pass on the objection itself. But this is to beg the question. In so holding, the Court did necessarily pass on petitioner's objection to the special jury and did necessarily hold that petitioner was not denied due process and equal protection of the laws. Whether or not such possession of such information constituted due process and equal protection of

the laws to petitioner in the trial by a special jury, is involved in and inseparable from the constitutional question raised by petitioner. As petitioner has pointed out above, it had no such effect and the question of denial of due process and equal protection of the laws is squarely raised and presented in the record for determination by this Court.

VII

The Questions Presented numbered 1 to 3, *supra*, p. 2, can be reviewed, as of right, by appeal under 28 U. S. C. 1257 (2). Probably, the Question Presented numbered 4, *supra*, p. 3, could also be raised on such appeal (*Flournoy* v. *Weiner*, 321 U. S. 253, 263). However, there is some uncertainty as to this, since the rights under the Federal Constitution claimed therein do not involve a consideration or application of Section 813a of the New York Code of Criminal Procedure, the validity of which is involved in Questions numbered 1 to 3. For this reason, in order to assure a determination on the merits of all of the questions presented, without being mired in any possible jurisdictional question, petitioner has proceeded by petition for certiorari under 28 U. S. C. 1257 (3) under which jurisdiction over all of the questions presented is expressly conferred on this Court. Since such election to proceed by petition for certiorari is thus essentially procedural, it is respectfully submitted that this furnishes an additional ground for the granting of the petition.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

IRWIN N. WILPON,
BURTON B. TURKUS,
Counsel for Petitioner.

March, 1957.

Constitutional Provisions and Statutes

United States Constitution—Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution—Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Communications Act of 1934 (Title 47 U. S. Code) Section 501:

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both. (June 19, 1943, c. 652, Sec. 501, 48 Stat. 1100.)

Section 605:

* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *.

New York Constitution Article I, Section 12

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. Adopted by Constitutional Convention of 1938; approved by the people Nov. 8, 1938.

New York Code of Criminal Procedure (McKinney's Consolidated Laws Book 66)

Section 470-a. Suspension of sentence; suspension of execution of judgment

If, after a plea or verdict of guilty or after a verdict against the defendant upon a plea of former conviction or acquittal, sentence shall have been suspended, the court may impose any sentence or make any commitment which might have been imposed or made at the time of conviction. If sentence shall have been imposed and execution of the judgment suspended, the court may revoke the order suspending execution of judgment and order executed the judgment suspended or may modify the judgment so as to provide for the imposition of any punishment which might have been imposed at the time of conviction. The court may impose sentence or order judgment executed with or without modification as hereinabove provided at any time after such suspension of sentence or suspension of execution of judgment within the longest period for which the defendant might have been sentenced or, if the defendant is on probation and the period of probation exceeds the period for which the defendant might have been sentenced, at any time while the defendant remains on probation; but not after the expiration of such period or periods, unless the defendant shall have been convicted of another crime committed during such period. Provided, however, that the imprisonment directed by the judgment shall not be suspended or interrupted after such imprisonment shall have commenced. Added L. 1893, c. 651, Sec. 1, as amended L. 1918, c. 467; L. 1920, c. 476; L. 1925, c. 276, Sec. 2, Eff. Sept. 1, 1925.

Section 618-a. Securing attendance of witnesses from within and without the State in criminal proceedings

1. As used in this section the following words shall have the following meanings unless the context requires otherwise.

'Witness' shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

'State' shall include any territory of the United States and the District of Columbia.

'Subpoena' shall include a summons in any state where a summons is used in lieu of a subpoena.

* * *

3. Witness from another state subpoenaed to testify in this state. If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state, such judge may direct that such witness be forthwith brought before him; and the judge being satisfied of the desirability of such custody and deliv-

ery, for which determination said certificate shall be prima facie proof, may order that said witness be forthwith taken into custody and delivered to an officer of this state, which order shall be sufficient authority to such officer to take such witness into custody and hold him unless and until he may be released by bail, recognizance, or order of the judge issuing the certificate.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of ten cents a mile for each mile and five dollars for each day that he is required to travel and attend as a witness. Such fees shall be a proper charge upon the county in which such criminal prosecution or grand jury investigation is pending. A witness who has appeared in accordance with the provisions of the subpoena shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness fails without good cause to attend and testify as directed in the subpoena, he shall be punished in the manner provided for the punishment of any witness who disobeys a subpoena issued from a court of record in this state.

Section 813-a. Ex parte order for interception

An ex parte order for the interception of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that

evidence of crime may be thus obtained and identifying the particular telephone line or means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than six months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based shall be delivered to and retained by the applicant as authority for intercepting or directing the interception of the telegraphic or telephonic communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same. Added L. 1942, c. 924, eff. May 23, 1942.

New York Judiciary Law (McKinney's Consolidated Laws Book 29)

Section 749-aa. Special jurors in certain counties

1. List of special jurors. The county clerk of each county of the state having a population of one million or more inhabitants, according to the last preceding federal census, shall select from the persons qualified to serve as trial jurors in such county such number of special jurors as the justices of the appellate division of the supreme court, or a majority of them

of the department in which such county is situated shall, from time to time direct. The names of the persons so selected liable to serve as special jurors shall be alphabetically arranged, with their places of business and the residence of each. Such county clerk, from time to time, may cancel such selection and strike the names of such special jurors from such list and select other special jurors in their places. Persons who are selected as aforesaid by such clerk to act as special jurors shall be exempt from all other jury duty from and after the date of their selection, and they shall remain so exempt so long as they continue to be such special jurors.

* * *

4. Application for special jury. Whenever an issue of fact has arisen in any civil or criminal action triable in a county embraced within the provisions of this section, the district attorney, or the defendant, if in a criminal action, or either party in a civil action may apply for a special jury to try such issue. Such application may be made at any term of the supreme court appointed to be held within the county where such issue is triable, or at any term of any other court of record in which court such issue is to be tried. It must be made upon the indictment, the plea thereto and an affidavit in a criminal action or the pleadings and affidavit in a civil action upon two days' notice to the adverse party or his attorney. Where, upon such application, it appears to the court that by reason of the importance or intricacy of the case, a special jury is required, or that the subject-matter of the indictment or the issue to be tried has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained to try such issue, or that for any other reason

the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury, the court to which the motion is made may make an order directing that such trial be had by a special jury, and such trial shall be had accordingly. The order must specify the time when the drawing of such special jury shall take place and the number of special jurors to be then drawn, the term of the court and particular day in the term when such special jury must attend. The day so specified for the attendance of the special jury must, except in the case of an order for additional special jurors drawn under subsection six of this section, be at least five days in addition to any Sunday, holiday or half-holiday, after the day specified for the drawing of the special jury.

• • •

8. Revision of list. In each county of the state to which this section applies, the names selected and composing the special jury list heretofore compiled, shall be the special jury list for such county subject to such revision thereof by striking therefrom and adding thereto the names of such jurors as from time to time the county clerk shall deem proper.

New York Penal Law (McKinney's Consolidated Laws Book 39)

Section 376-a. Person communicating with juror

A person who wilfully converses or communicates or attempts to converse or communicate in any manner with a juror or a person known to him to have been drawn or summoned to attend as a juror in respect to the issues, merits, decision, verdict, opinion, award, or report of a cause or matter pending or about to be brought before him, except according to

the regular course of proceeding upon the trial or hearing of that cause or matter, is guilty of a misdemeanor. Added L. 1933, c. 95, Sec. 2, eff. Sept. 1, 1933.

Section 600. Criminal contempt

A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor;

* * *

6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory;

Section 1423

A person who wilfully or maliciously displaces, removes, injures, or destroys:

* * *

6. A line of telegraph or telephone, wire or cable, pier or abutment, or the material or property belonging thereto, without lawful authority, or shall unlawfully and willfully cut, break, tap, or make connection with any telegraph or telephone line, wire, cable or instrument, or read or copy in any unauthorized manner any message, communication or report passing over it, in this state; or who shall willfully prevent, obstruct or delay, by any means or contrivance whatsoever, the sending, transmission, conveyance or delivery, in this state of any authorized message, communication or report by or through any telegraph or telephone line, wire or cable, under the control of any telegraph or telephone company doing business in this state: * * *

Section 2447. Witnesses' immunity

1. In any investigation or proceeding where, by express provision of statute, a competent authority is

authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

3. "Competent authority" as used in this section means:

* * *

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; * * *.

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FILED
MAR 25 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 857

LOUIS B. SAPERSTEIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

No. 211.

THE PEOPLE &c.,

Respondent,

—VS.—

LOUIS B. SAPERSTEIN,

Appellant.

Opinion of Court of Appeals of State of New York

DESMOND, *J.*:

Defendant's conviction was for five crimes of criminal contempt (Penal Law, §600). The jury's verdict of guilt amounted to findings that defendant, on his appearances as a witness under subpoena before a New York County Grand Jury on March 11 and 15, 1954, had been five times guilty of contumacious refusals to answer legal and proper questions in that he failed and refused to state definitely who were the participants in five telephone conversations which had been wire tapped and the recordings of which were read to defendant before the Grand Jury. On this trial for the alleged contempts it was proven that in each of those wire tap telephone conversations, plaintiff himself had been one of the speakers, that in each instance the other speaker and the latter's voice was well known to defendant and that each such conversation had to do

with business dealings of defendant highly important to him and long continued and elaborate. It is thus clear without further demonstration that the jury was justified in saying that defendant's failures or refusals to answer those questions and his evasiveness when he did answer amounted to criminal contempts as charged in the indictment. It is not disputed that the Grand Jury testimony thus sought to be gotten from defendant would have been material and pertinent to the Grand Jury's inquiry into alleged violations, in which defendant, an insurance broker, and others were said to be involved, of sections 5 and 113 of the Insurance Law and sections 380 and 580 of the Penal Law.

We turn to the errors which defendant says were committed on the trial and which he urges as grounds for reversal. All the telephone talks above referred to had been intercepted by wire tappings authorized by court orders made pursuant to section 813-a of the New York Code of Criminal Procedure, and all the conversations had been recorded. It is settled that such recordings are admissible in evidence in the courts of New York State (*Matter of Harlem Check Cashing Corp.* v. *Bell,* 296 N. Y. 15). The *Harlem* case holding was that New York State's method of permitting the tapping of wires and the admission into evidence of the recordings thereof is not a violation of section 605 of the Federal Communications Act (47 U. S. C. 605) which says that:

"* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or mean-

ing of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto." (See, as to criminality, 47 U. S. C. 501.)

In 1952, six years after our *Harlem* decision, the United States Supreme Court came to the same conclusion in *Schwartz* v. *Texas* (344 U. S. 199) with a flat holding that section 605 does not operate to invalidate a State statute, such as our section 813-a of the Code of Criminal Procedure (*supra*), authorizing the tapping of wires and the receipt in evidence of the records thereof. Despite *Harlem* and *Schwartz* (*supra*) defendant argues here that section 813-a is violative of the Federal Constitution and of the Federal Communications Act, that the questions which defendant failed to answer were such as would, if answered, cause him to commit a Federal crime and so could not properly be the basis for a criminal contempt charge, and, finally, compulsion by subpoena or contempt proceedings to divulge contents of intercepted telephone conversations deprived defendant of his rights under the Federal Constitution and the Federal Communications Act. Our answers to these assertions can be brief.

The general constitutionality of section 813-a of the Code of Criminal Procedure (*supra*) has long been settled (*Matter of Harlem Check Cashing Corp.* v. *Bell, supra; Black* v. *Impellitteri,* 201 Misc. 371, affd. 281 App. Div. 671, appeal dismissed for want of a substantial constitutional question 305 N. Y. 724; *People* v. *Feld,* 305 N. Y. 322, 330). The *Harlem* and *Schwartz* cases cited in the next above paragraph of this opinion show that no Federal statute pre-

vents the divulging, in New York courts as evidence, of intercepted telephone conversations. It is clear, too, that this rule of evidence is not affected by the circumstance that requiring a witness to testify as to wire taps might force him to a criminal violation of the Federal Communications Act (*People* v. *Stemmer*, 298 N. Y. 728, affd. by equally divided vote 336 U. S. 963; also, *Schwartz* v. *Texas, supra*). Coming down to the particular facts of this case, it is far from clear that the Federal Communications Act prohibition covers divulgence by a participant in the conversation. However, it is entirely clear, first, that what this defendant was asked to do before the Grand Jury did not come within the language of the Federal Communications Act, and, second, that the divulgence asked of him was not a voluntary one but under compulsion of a subpoena. If a participant in a telephone conversation is forbidden from testifying as to its contents because it was intercepted, then he would likewise be forbidden from testifying to it if not intercepted, since in both instances he would be violating the same supposed privilege or right said by defendant to belong to the other party to each conversation. The Federal Communications Act is intended to prevent or punish intrusion into the telephone conversation of others. There is no support in the cases for the contention here made that the Act grants any kind of privilege to a telephone talker against divulgence by the person on the other end of the telephone wire of the contents of the talks. *United States* v. *Polakoff* (112 F. 2d 888 [2nd Cir.]) is not in point since, despite its discussion as to "privilege", it was not a case of divulgence by a participant (for other Federal cases of wire taps by Federal police officers with the consent of one of the telephone talkers, see *United States* v. *Yee Ping Jong*, 26 F. Supp. 69; *United States* v. *Sullivan*, 116 F. Supp. 480; *United States* v. *Pierce*, 124 F. Supp. 264, affd. 224 F. 2d 281; *Flanders* v. *United States*, 222 F. 2d 163).

Although no particular point is made of it by the briefs here, we note that our own State has, in subdivision 6 of section 1423 of the Penal Law, a statute forbidding wire tapping. We have held (*People* v. *Applebaum*, 301 N. Y. 738) that despite that statute's general language, it was not intended to prohibit a wire tap by a telephone subscriber of his own telephone. In the case before us defendant did not even tap the line but was asked before the Grand Jury to identify the voices on a recording of a wire tap by someone else. It is far-fetched to say that his giving of such testimony would be a crime.

What has been said above sufficiently answers appellant's "Third Point" as to the alleged conflict between the Federal Communications Act on the one hand and section 813-a of the New York Code of Criminal Procedure and section 12 of article I of the New York State Constitution on the other hand. Really, the only wire tapping question we have before us here is as to whether this defendant had any valid excuse for refusing to give testimony identifying the voices in recordings of wire taps made by other persons, of conversations in which defendant took part.

Defendant argues in other points of his brief that it was error on this trial to put before the trial jury the whole of his Grand Jury testimony on the five days he testified there, and, second, that it was error in any event to put before this trial jury any testimony as to defendant's Grand Jury testimony on March 2, 1954. As to the first of these points, it is true that the only direct issue on this contempt trial was as to whether defendant had been criminally evasive and unco-operative in failing to give definite answers as to whose voices were on the recordings. Defendant says that it was prejudicial error to let the trial jury hear all of defendant's examination before

the Grand Jury, particularly because that testimony included references, prejudicial to defendant, as to his alleged association with notorious underworld characters and as to various improprieties and illegalities in the way in which he transacted his insurance brokerage business. Defendant says that proof before the trial jury of his alleged contumacious conduct in refusing to answer questions about the wire taps should have been limited to the questions he is supposed to have refused properly to answer and his answers thereto. But it would be impossible to prove such a contempt in such a way. Before the Grand Jury, defendant swore that his failure to state whether he had taken part in these telephone conversations was because he could not recall the conversations. The State on the other hand contended on this contempt trial that defendant had simply refused to answer the questions because he did not wish to disclose his relationships with certain persons of bad reputation. On this particular record and without suggesting that the same practice would be valid in another case, we hold that because of the form which defendant's contempt here took it was proper to show the trial jury that defendant must have recognized the voices because he had had such numerous and important transactions with those persons. Here defendant pretended that he did not remember the voices and the conversations. The People established to the satisfaction of the trial jury that defendant did remember the conversations. This the prosecution did by showing that defendant, in some parts of his Grand Jury testimony, recalled many details about his business and admitted that he had had many transactions with the people who apparently took part with him in these wire tapped talks, but that his memory failed him only at the point where it was embarrassing for him to re-

member certain conversations (see *Matter of Finkel* v. *McCook,* 247 App. Div. 62, affd. 271 N. Y. 636).

As to the admissibility of defendant's Grand Jury testimony on March 2, 1954, before he had been granted immunity, his argument is that the March 2 testimony, under the rule of *People* v. *Gillette* (126 App. Div. 665), could not be used against him for any purpose whatever. Defendant says that the taking from him by the Grand Jury on March 2, 1954, of testimony which had a tendency to incriminate him was a violation of his constitutional rights and that the testimony was a legal nullity. It is not necessary, however, on this record to reach or discuss the question as to whether the grant of immunity (see Penal Law, §2447) to defendant before the Grand Jury on his second appearance there on March 9, 1954, reinstated or validated defendant's March 2, 1954, Grand Jury testimony so that it could be used against him on this present trial for contempt. Whether or not it was error to put the March 2, 1954, pre-immunity pre-trial testimony before this trial jury, no prejudice to defendant could have resulted therefrom since the March 2 testimony was preliminary and background testimony only as to the place, personnel and methods of operation of the several offices at which defendant's insurance brokerage business was conducted. The March 2 Grand Jury testimony may have had some effect at this contempt trial in making it a little clearer to the trial jury how defendant ran his insurance business but it had no tendency in itself to convict him of contempt. The five wire taps were all read to defendant on later appearances before the Grand Jury on March 11 and March 15, 1954, and all his alleged contumacious refusals took place on those later dates. Accordingly, we do not see that *People* v. *De Feo* (308 N. Y. 595) has any pertinency here. There is no question here as to whether this defendant

could have been convicted of a contempt for failing to answer questions put to him before he had been granted immunity. The alleged contempts here were all committed after an effective grant of immunity.

Defendant makes another argument which necessitates an inquiry similar to that which this court made in *People* v. *Brinkman* (309 N. Y. 974). Defendant says that the indictment on which he was here tried was illegal in that the entire testimony of defendant before the Grand Jury and on which he was indicted was not heard by at least twelve of the grand jurors who voted to indict. The rule of the *Brinkman* case, shortly stated, is that an indictment is good despite the absence of certain grand jurors on various days when testimony is heard, so long as "at least twelve of the grand jurors, who voted to indict, heard all essential and critical evidence" (309 N. Y., p. 975). Exhibits in the present case show that thirteen of the grand jurors who voted for the true bill were present on these three dates: March 11 and March 15, 1954, being the two days on which the recordings were read to defendant and he failed to identify the voices, and May 13, 1954, the day the indictment was voted. It is true that although twelve of those thirteen were present on March 9, which is another day on which testimony was taken, fewer than twelve of those who indicted were in attendance on March 2 and on April 20, on which two latter days also certain testimony was heard by the Grand Jury. But, applying the *Brinkman* rule (*supra*), we do have more than twelve of the grand jurors who voted a true bill hearing all the really material testimony which was all given before the Grand Jury on March 11 and 15. While much testimony was taken on the other dates above mentioned, it was not testimony as to the contempts themselves and amounted to no more than background and explanatory material. In our judg-

ment enough testimony was heard on March 11 and 15 to justify the indictment and thirteen of the voting jurors heard all of that testimony on those two days. Defendant was not prejudiced in that not all these thirteen heard the testimony on the other three days, since nothing heard on those three days had any tendency to exculpate defendant.

Defendant says that it is inconsistent for the People to argue: first, that the testimony on April 20 and May 13 was properly put before this trial jury as material on the issue of contempt and, second, that it was not so material to the contempt that failure of all the grand jurors to hear it invalidated the indictment. We see no such inconsistency.

As to appellant's assertion that he was guilty of one contempt only, not five contempts, it is a sufficient answer that his contumacious conduct had to do with five separate telephone talks. We do not get to the question as to whether each separate unanswered question could be a separate contempt since in each instance here it was a separate whole conversation that was made the subject of a charge of contempt.

Defendant-appellant's last argument to us is that his rights were invaded in connection with the use on his trial of a so-called special or "blue ribbon" trial jury. The constitutionality in general of the New York State statutes as to the use of special trial juries in criminal cases was upheld by the United States Supreme Court in *Fay* v. *New York* (332 U. S. 261) and *Moore* v. *New York* (333 U. S. 565). This appellant's objections are not to the use of special jury panel as such, but to the possession by the prosecutor of reports of investigations made for the prosecutor of some of the individuals on this panel of special jurors. Whatever substance this objection might otherwise have was removed by the act of the District Attorney in presenting to defense counsel, prior to the trial, copies

of all the investigation reports which the prosecutor had as to the 150 special jurors drawn for this trial. We do not see how defendant's rights were invaded since, so far as the record shows, his counsel had, well before the trial, the same information that the prosecutor had.

The judgment appealed from should be affirmed.

* * * * *

Judgment affirmed. Opinion by Desmond, *J.* All concur.

Order and Judgment of Affirmance and Remittitur of Court of Appeals of State of New York

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 10th day of January in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court,

Witness,

The HON. ALBERT CONWAY,
Chief Judge, Presiding.

RAYMOND J. CANNON, *Clerk.*

Remittitur January 10, 1957

No. 211.

THE PEOPLE ETC.,

Respondent,

—VS.—

LOUIS B. SAPERSTEIN,

Appellant.

BE IT REMEMBERED, That on the 29th day of June in the year of our Lord one thousand nine hundred and fifty-six, Louis B. Saperstein, the appellant—in this cause, came here unto the Court of Appeals, by Burton B. Turkus, his attor-

Order and Judgment of Affirmance and Remittitur of Court of Appeals of State of New York

ney—, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The People etc., the respondent—in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Irwin N. Wilpon, of counsel for the appellant—, and by Mr. Albert P. Loening, Jr., of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Court of General Sessions of the County of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Court of General Sessions of the County of New York, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Court of General Sessions, before the Judge thereof, etc.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York.

Order and Judgment of Affirmance and Remittitur of Court of Appeals of State of New York

COURT OF APPEALS, CLERK'S OFFICE,)
Albany, January 10, 1957.)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

Amended Remittitur of Court of Appeals

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-fourth day of January A. D. 1957.

Present,

HON. ALBERT CONWAY,
Chief Judge, presiding.

Mo. No. 78

THE PEOPLE &c.,

Respondent,

—vs.—

LOUIS SAPERSTEIN,

Appellant.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Amended Remittitur of Court of Appeals

"Upon this appeal there were presented and necessarily passed upon questions under the Constitution of the United States, as follows:

1. The appellant contended that the acts of the State of New York in affirmatively sanctioning by Court order the interception of the telephone communications between George Scalise and the appellant and, after having so intercepted, compelling the attendance of appellant as a witness from another State to divulge said intercepted telephone communications under threat and compulsion of contempt was a denial to appellant of due process of law in violation of the Fourteenth Amendment to the Federal Constitution. This Court held to the contrary.

2. The appellant contended that Section 813-a of the Code of Criminal Procedure of the State of New York and Article 1, Section 12, of the Constitution of the State of New York conflict with Section 605 of the Federal Communications Act (U. S. Code, tit. 47, Sec. 605) and are invalid and must yield under the Supremacy Clause, Article VI, clause 2, of the Federal Constitution. This Court held to the contrary.

3. The appellant contended that Section 813-a of the Code of Criminal Procedure of the State of New York and Article 1, Section 12, of the Constitution of the State of New York are unconstitutional in that they and the ensuing enforcing by compulsion of the defendant to testify with respect to the intercepted telephone communications between George Scalise and the appellant constitute the making and enforcing by the State of New York of laws which abridge the privilege or immunity afforded appellant by Section 605 of the Federal Communications Act (U. S. Code, tit. 47, Sec.

605), in violation of the Fourteenth Amendment to the Federal Constitution. This Court held to the contrary."

AND the Court of General Sessions, New York County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

(Seal)

A copy

GEARON KIMBALL
Deputy Clerk

Per Curiam Opinion of Appellate Division, First Department

PER CURIAM:

This is an appeal from a conviction for criminal contempt in giving false and evasive answers before a grand jury. Error, among others, is assigned in the admission of grand jury testimony, before the defendant, then a witness, was granted immunity or warned that he was a prospective defendant who was entitled to claim his constitutional privilege against self-incrimination.

There was no error in the admission of testimony given in the grand jury before the defendant obtained immunity under section 2447 of the Penal Law. Once immunity was conferred, any infirmity in the testimony was removed. *People* v. *De Feo* (308 N. Y. 595) held that immunity under the statute was not effectively granted when the witness was advised that he was entitled to immunity of less than the scope granted by the statute. *People* v. *Gillette* (126

App. Div. 665) involved the constitutional privilege, and not immunity. A breach of the privilege renders the grand jury testimony unavailable in any prosecution by indictment, or for perjury or contempt; but it does not confer immunity (*People ex rel. Coyle* v. *Truesdell,* 259 App. Div. 282).

While it was also held in the *De Feo* case (*supra*) that the rule in the *Gillette* case (*supra*) survived the enactment of the new statute (Penal Law, §2447), the question was not reached as to the effect on prior testimony of the granting of immunity to the witness whose privilege had been ignored in the first instance. Since, contrary to the situation in the *De Feo* case, defendant here was effectively granted immunity, the testimony, because it was relevant to evaluating the claimed non-recollections by defendant, was properly admitted. Once the privilege is avoided by the granting of immunity, there is no occasion for enforcing the privilege by totally denying effect to testimony taken in violation of the privilege. Of course, a different situation would be present if the contempts charged here rested on testimony given before the granting of immunity. We are not concerned with that situation, however, but only with the relevancy of the prior testimony, and it is our view that not even under the *Gillette* rule, amplified by the statute, is such prior testimony rendered wholly null or irrelevant.

Accordingly, the judgment of conviction should be affirmed, subject only to the remission directed in the related appeal (Appeal No. 9937).

All concur

Order and Judgment of Affirmance of Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 24th day of April, 1956.

Present:

HON. CHARLES D. BREITEL,
Justice Presiding.
HON. BENJAMIN J. RABIN,
" JOSEPH A. COX,
" MARTIN M. FRANK,
" EARLE C. BASTOW,
Justices.

THE PEOPLE OF THE STATE OF NEW YORK,
Respt.,

—vs.—

LOUIS B. SAPERSTEIN,
Deft.-Applt.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Court of General Sessions of the County of New York, rendered on the 30th day of July, 1954, said appeal bringing up for review intermediate orders entered May 28, 1954 and June 11, 1954, and said appeal having been argued by Mr. Irwin N. Wilpon of counsel for the appellant, and by Mr. Paul A. Stone of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed, subject only to the remission directed in the related appeal (Appeal No. 9937).

ENTER:

GEORGE T. CAMPBELL,
Clerk.

Notice of Appeal to Appellate Division

COURT OF GENERAL SESSIONS

County of New York

People of the State of New York,

—against—

Louis B. Saperstein,

Defendant.

Sirs:

Please take notice, that the defendant, Louis B. Saperstein, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, from the judgment of conviction of the Court of General Sessions, County of New York, rendered on the 30th day of July, 1954, convicting the said defendant of the crime of criminal contempt and sentencing the defendant to a term in the penitentiary of one year on each of the five counts of the indictment to run consecutively, and the said defendant appeals from each and every part of said judgment as well as from the whole thereof, and from each and every intermediate order therein made.

Please take further notice that the defendant will bring up for review on this appeal the order of the Court of General Sessions made by Hon. John A. Mullen, a Judge thereof, on the 26th day of May, 1954, and entered in the Office of the Clerk of the Court of General Sessions on the 26th day of May, 1954, granting the motion of the District Attorney for the trial of this action before a

special jury, together with the amended order of said Court made and entered on the 28th day of May, 1954 in connection therewith.

PLEASE TAKE FURTHER NOTICE that the defendant will bring up for review on this appeal that portion of the order of the Court of General Sessions made by Hon. John A. Mullen, a Judge thereof, on the 11th day of June, 1954, and entered in the office of the Clerk of General Sessions on the 11th day of June, 1954, which denied the defendant's motion for a bill of particulars of the indictment herein.

Dated, New York, the 2nd day of August, 1954.

Yours, etc.,

BURTON B. TURKUS
Attorney for Defendant
Office and Post Office Address
No. 11 East 44th Street
Borough of Manhattan
New York 17, N. Y.

To:

FRANK S. HOGAN, Esq.
District Attorney of New York County
155 Leonard Street
New York, N. Y.

CLERK OF THE COURT OF GENERAL SESSIONS
COUNTY OF NEW YORK

Notice of Appeal to Court of Appeals

COURT OF GENERAL SESSIONS

COUNTY OF NEW YORK

Indictment #1663-1954

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

—against—

LOUIS B. SAPERSTEIN,

Defendant-Appellant.

SIRS:

PLEASE TAKE NOTICE that, pursuant to permission granted by a certificate of Honorable Stanley, H. Fuld, Associate Judge of the Court of Appeals, made on the 4th day of May, 1956, the defendant above-named hereby appeals to the Court of Appeals of the State of New York from the order and judgment of the Appellate Division, First Judicial Department, made and entered on the 24th day of April, 1956, unanimously affirming the judgment of the Court of General Sessions, County of New York, entered on the 30th day of July, 1954, convicting the defendant of the crime of criminal contempt, and the defendant appeals from each and every part of said order and judgment.

Notice of Appeal to Court of Appeals

Dated, New York, N. Y., May 4, 1956.

Yours, &c.,

BURTON B. TURKUS,
Attorney for Defendant,
Office & P. O. Address,
11 East 44th Street,
Borough of Manhattan,
New York 17, N. Y.

To:

HON. FRANK S. HOGAN,
District Attorney, New York County,
155 Leonard Street,
New York, N. Y.

Clerk of the Court of General Sessions,
County of New York.

Excerpts From Indictment

COURT OF GENERAL SESSIONS

COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

LOUIS B. SAPERSTEIN,

Defendant.

THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment, accuse the defendant of the crime of CRIMINAL CONTEMPT, in violation of Section 600, subdivision 6, of the Penal Law, committed on March 11, 1954, in the County of New York, as follows:

Prior to, and from on or about March 2, 1954, to on or about April 20, 1954, in the County of New York, the Fourth* Grand Jury of the County of New York, November 1953 Term Continued, having been duly and properly impaneled, was engaged in an investigation of the insurance welfare funds of certain labor unions and the activities of certain insurance carriers and certain insurance agents who placed with the said insurance carriers contracts of life, accident and health insurance for the benefit of members of various labor unions. This investigation, a criminal action, was and is entitled *"The People of the State of New York* v. *John Doe, et al."*

* Part One, May 14/54. On motion of District Attorney amended.
JAM
Judge of the Court
of General Sessions

Excerpts From Indictment

The said Grand Jury sought to determine whether the commissions received by the said insurance agents had been or were being split with certain labor union officials and other unauthorized persons, in violation of Sections 5 and 113 of the Insurance Law of the State of New York; whether a criminal conspiracy to commit such crimes was or had been in existence; and whether the said various insurance agents had bribed or were bribing, or had conspired or were conspiring with others to bribe, the said various labor union officials, in violation of Sections 380 and 580 of the Penal Law of the State of New York.

In the course of the said investigation it became material and necessary to examine the defendant, Louis B. Saperstein, to determine whether he, the defendant, was or had been engaged with others in a conspiracy to violate Sections 5 and 113 of the Insurance Law and Sections 380 and 580 of the Penal Law of the State of New York.

It also became material and necessary to interrogate the defendant, Louis B. Saperstein, before the said Grand Jury in order to determine, among other things: whether one George Scalise, as part of said conspiracy, had been instrumental in obtaining for the defendant contracts of life, health and accident insurance which the defendant placed, as agent, with certain insurance carriers for the benefit of members of various labor unions; whether, as part of said conspiracy, the said George Scalise had benefited financially thereby, and whether he had a financial interest in the insurance business of the defendant; whether, as part of said conspiracy, the said George Scalise had instructed, ordered, directed, counseled and advised the defendant in the conduct of the latter's insurance business; and whether, as part of said conspiracy, the said George Scalise had unlawfully split with the defendant commissions received by the latter as a result of contracts

of group life, accident and health insurance placed by him, as agent, for the benefit of members of the various labor unions, including, but not limited to, those specifically hereinafter set forth.

The defendant, having been duly sworn as a witness on March 2, 1954, before the said Grand Jury, testified under oath before a quorum of the said Grand Jury on March 2, March 9, March 11, March 15, and April 20, 1954.

The defendant testified on those occasions that he was a resident of the State of New Jersey; that he had been engaged in the insurance business, as an agent, for about 25 years; that he controlled, and was an officer of, Harlew Agency, Inc., Dean Agency, Inc., and Elby Agency, Inc., all New Jersey corporations, with offices located in Newark, New Jersey, and Harlew Agency of Illinois, Inc., and Harlew Agency of California, Inc., insurance agencies incorporated in the states whose names they bear; and that his gross commissions on group insurance placed by him in 1953 was about half a million dollars.

The defendant testified further that he commenced doing group insurance business in about 1946; that since that time he, as agent, had placed substantial amounts of group insurance, on behalf of members of various labor unions throughout the country, including, among others, all the locals of the Distillery, Rectifying and Wine Workers' International Union of America, A. F. of L., with offices in Union City, New Jersey, and Chicago, Illinois, and including, more particularly, the following New York locals of the said international liquor union, located in the County of New York:

Local 1—Wine, Liquor and Distillery Workers' Union;

Local 2—Wholesale Licensed Alcoholic Beverage Salesmen's Union of New York;

Local 18—Wholesale Wine Salesmen's Union.

Excerpts From Indictment

The defendant further testified that in the early part of 1952, the secretary-treasurer of the Distillery, Rectifying and Wine Workers' International Union of America, A. F. of L., requested him to split with one Victor Franco, a brother-in-law of George Scalise, the commissions that he, the defendant, derived from the placement of contracts of insurance on behalf of the members of that union. The defendant further testified that he felt impelled to accede to this request in order to "preserve his business."

It was further testified by the defendant that, during the period from March, 1952, to March, 1954, in compliance with that request, he had turned over to Victor Franco the sum of about $92,000.00. He also testified that Victor Franco rendered absolutely no service for the money received by him from the defendant.

In the course of the said investigation it became material and necessary to ask the defendant whether he had participated in a telephone conversation of about twenty-five minutes duration, on or about November 14, 1952, with one George Scalise. In that connection, during the course of his testimony before the said Grand Jury on March 11, 1954, a recording of a lengthy telephone conversation between one "George" and another male, who referred to himself therein as "Louis," was played back to the defendant.

In this conversation "George" sought to familiarize himself with respect to the activities of "Louis" in connection with the latter's negotiations with an insurance carrier for the placing of a contract of group life insurance.

The parties to the said conversation engaged in a lengthy discussion of the proposed contract, during which "Louis" attempted to explain to "George" the terms which he had negotiated with the carrier. "George" voiced dissatisfaction with "Louis'" efforts. "Louis," on the other hand,

stated that he was satisfied with the proposed contract, which was to be of one year's duration and which was to pay ten-percent commission, subject to a decrease in commission if the carrier failed to make money on the contract. "George" expressed great dissatisfaction with the proposed contract, stating that it was his understanding that other contracts negotiated by "Louis" provided for twenty-percent commission.

In the course of the said conversation, "Louis" maintained that the proposed contract was satisfactory because it was the first one which the carrier had agreed to negotiate on a straight-commission basis and said he was willing to "gamble" with it.

In discussing the contract terms, "George" told "Louis" that, as he knew nothing about insurance, he was compelled to accept "Louis'" appraisal of the desirability of the proposed contract, but that he wanted no excuses and no "hitches" later.

At the termination of the discussion of the contract terms, "George" told "Louis" to have the contract signed on the following Monday and then to telephone "Babe" and tell him to call a meeting to "put through the contract." "Louis" replied, "It's very unusual but I'll do it your way. * * * It's embarrassing to do it this way."

When, in the course of the said conversation, "Louis" expressed the fear that "Babe" would sign claim checks indiscriminately, "George" instructed "Louis" to tell "Babe" not to sign checks.

Turning to another subject in this conversation, the parties agreed that the insurance of the "Bartenders in the Bronx" would be allocated to "Elby."

In concluding the said conversation, "George" stated that he was anxious to get started with the proposed contract so that "I can get these fellows moving on some other insurance."

Excerpts From Indictment

The defendant, after having heard the said playback of the said recorded telephone conversation, and upon being questioned concerning it, and the contents thereof, contumaciously and unlawfully refused before the said Grand Jury to answer legal and proper interrogatories of the said Grand Jury as to whether he had participated in the aforesaid telephone conversation, in that he evasively, equivocally and falsely stated that he did not know and could not tell whether he had participated in the said telephone conversation.

* * * * *

Order for Interception of Telephone Communications

COURT OF GENERAL SESSIONS

County of New York

In the Matter

of

Intercepting Telephonic Communications Transmitted over COLumbus 5-6165, 6166 and 6167.

It appearing from the affidavit of Vincent A. G. O'Connor, Assistant District Attorney of the County of New York, sworn to on October 8, 1952, that there is reasonable ground to believe that evidence of crime may be obtained by intercepting telephonic communications transmitted over the telephone lines and instruments bearing the numbers COlumbus 5-6165, 6166 and 6167, listed in the name of Wholesale Licensed Alcoholic Beverage Salesmen's Union of State of New York, No. 20376, and located at 250 West 57th Street, in the County, City and State of New York, in premises occupied by said union, it is

Ordered, that the District Attorney of the County of New York or any police officer or other agent acting under the direction of the District Attorney be, and he hereby is, authorized and empowered to intercept telephonic communications transmitted over the said telephone lines and instruments; to cut, break, tap and make connection with such wires leading to or from said telephone lines and instruments which the District Attorney or his agent may deem reasonable for that purpose; and to do all things necessary to permit the communications transmitted over

said telephone lines and instruments to be intercepted; and it is further

ORDERED, that this order shall be effective until and including April 7, 1953.

Dated, New York, N. Y., October 9, 1952.

JOHN A. MULLEN
Judge of the
Court of General Sessions

Excerpts from Record Concerning Interception Order

* * * * *

Mr. Turkus: And now may it please the Court, I call upon the District Attorney to admit and concede that all of the telephone conversations which were either read to this defendant, Saperstein, or were played back on a recording apparatus, before the Grand Jury, during the defendant's testimony on March 9, March 11, March 15, and April 20, 1954 were and consisted of intercepted and recorded telephone conversations which were intercepted and recorded pursuant to an order, or orders, of a Judge of the Court of General Sessions authorizing such interceptions and recording and that such telephone conversations were intercepted and recorded without the consent of any of the parties to said telephone conversation. In addition, that this refers to and includes any and each of the telephone conversations appearing in the Minutes of the Grand Jury and to each of the telephone conversations pleaded and set out in each of the counts of the indictment.

Excerpts from Record Concerning Interception Order

Mr. Scotti: I so concede, Your Honor, and I now ask that the Court make a declaration of the law governing the interception of such telephone conversations.

Mr. Turkus: Now, I object to any declaration of the law at this point on that.

The Court: Well, I shall read to the jury at this point—because it seems to be the appropriate time to do it—just what the law was as governing the interceptions which have just been conceded here. That law is Section 813-A of the Code of Criminal Procedure, which reads, as follows—it is headed "Ex Parte Order for Interception."

It reads: "An ex parte order for the interception of telegraphic or telephonic communications may be issued by any Justice of the Supreme Court, or Judge of a County Court, or of the Court of General Sessions of the County of New York, upon oath, or affirmation, of a District Attorney, or of the Attorney General, or of an officer above the rank of sergeant of any Police Department of the State, or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular telephone line or means of communication and particularly describing the person, or persons, whose communications are to be intercepted and the purpose thereof.

"In connection with the issuance of such an order the Justice, or Judge, may examine on oath the applicant and any other witnesses he may produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than six months unless extended or renewed by the Justice or Judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest.

Excerpts from Record Concerning Interception Order

"Any such order, together with the papers upon which the application was based shall be delivered to and retained by the applicant as authority for intercepting or directing the interception of the telegraphic or telephonic communications transmitted over the instrument, or instruments, described. A true copy of such order shall at all times be retained in his possession by the Judge or Justice issuing the same."

Mr. Turkus: Now, may it please Your Honor, I respectfully request Your Honor to further instruct the jury in this connection that while the obtaining by the District Attorney from a Judge of the Court of General Sessions of an order pursuant to 813-A of the Code of Criminal Procedure, authorizing the District Attorney and the police to intercept telephone conversations may absolve the District Attorney and the police of any liability under Section 1423 of the Penal Law, which is the State Law prohibiting the interception of telephone conversations, such an order, however, cannot absolve the District Attorney, or the police, from the commission of a Federal crime in violation of Sections 605 and 501 of the United States Code; that in intercepting and divulging the telephone conversations in this case the District Attorney and the police who participated in such interception and divulging, or divulgence, committed a Federal crime for which they could be prosecuted.

The Court: I shall reserve decision on that application until I see the Sections of the Federal Code which you referred to.

Mr. Turkus: I take exception.

Mr. Scotti: Your Honor, I wish—

Mr. Turkus: Let me finish. I take exception to the Court's refusal to charge right at this point.

The Court: Have you the law before you?

Excerpts from Record Concerning Interception Order

Mr. Turkus: Yes, here it is.

Mr. Scotti: May I make a statement, Your Honor?

The Court: Yes.

Mr. Scotti: I am pretty familiar with this law.

The Court: I want to be familiar with it.

Mr. Scotti: I appreciate the motive behind the statement.

The Court: I don't care what the motive is, I want to know what the law is. That is what I am here for, to decide the law.

(A document was then passed to the Court for examination.)

The Court: I decline to instruct the jury as requested at this time because in the light of the record in this case at the present time the instruction requested is not applicable. If and when it becomes applicable I shall entertain a renewal of your application.

Mr. Turkus: To which I respectfully record my exception. At this point I ask that there be marked for identification, and marked so that it becomes a portion of this record for identification, each and every order of a Judge of the Court of General Sessions with regard to the interception and recording of telephone messages in this case.

The Court: All orders?

Mr. Scotti: I would be glad to do so.

The Court: All orders of this Court and the affidavits on which they were made will be marked for identification.

Mr. Scotti: Now, Your Honor, may I make a statement with respect to the law on the subject?

The Court: The jury will disregard the request for instruction made by the defense counsel.

Excerpts from Record Concerning Interception Order

Mr. Scotti: Now, Your Honor, it has been established over the years that under 813-A the District Attorney and other law enforcement agents are empowered in the manner so described in the Section to intercept telephone conversations. Never has such activity been declared illegal, Your Honor.

Mr. Turkus: I object to that.

Mr. Scotti: You made your statement, let me make mine, because you had a certain purpose in making the statement in the presence of the jury and I think it is only fair for me to clarify the position of the People at this time, Your Honor.

Mr. Turkus: The United States Supreme Court—

Mr. Scotti: If he wants to discuss law he could have done so in good faith in the absence of the jury, but he did this deliberately, Your Honor, when the jury was convened.

Mr. Turkus: He asked you to charge, Your Honor, on the law of 813.

Mr. Scotti: That is the law of the State of New York.

Mr. Turkus: Right. I asked Your Honor to amplify it, and I am supported by United States Supreme Court decisions on that.

The Court: Well, I say I refuse to give the instruction at this time because in the light of the record in this case, to date, there was no application of that request to the facts in this case.

Mr. Scotti: I want to go further.

Mr. Turkus: I except.

Mr. Scotti: In the United States Supreme Court we had a case tried right in this Court here, People v. Stemmer, the very same point was raised and affirmed by the United States Supreme Court. That is how much my friend is quoting the law in this case. We have every justification to do what we did do, Your Honor.

Excerpts from Record Concerning Interception Order

The Court: Well, I am only—

Mr. Scotti: I don't want this jury to get the impression which Mr. Turkus in a very indirect way is seeking to convey, that we did not act with complete propriety.

The Court: Now, gentlemen of the jury, this is a splendid example of why you should take your law from the Court and from the Court, alone, and follow the Court's instructions on it. Don't get yourselves disturbed by any question of law. I will give you the law when the time comes, or as we go along. You follow my instructions on the law and you attend to the facts, that is your job. You make the final decision on the facts, as to whether or not the defendant is guilty or not guilty under the instructions which I shall give you.

Mr. Turkus: May it please the Court, I should like the record to indicate that while the point of law was being discussed in the absence of the jury the Assistant District Attorney stated to Your Honor that he was going to request you to charge the jury with respect to the law on Section 813-A of the Code of Criminal Procedure.

The Court: I so tell the jury.

Mr. Turkus: Right, and I said if he did that he would invite a counter move on my part, and I want the record to indicate that and that the jury so understand it.

The Court: That was said by defense counsel.

Now, gentlemen (to jury), again it may help you understand a little bit why there are delays in your being in this court room. There are points which counsel on both sides thresh out and I rule upon before any reading of testimony is submitted to you, because I will not permit any testimony to go before you unless I deem that it is admissible under the laws of The State of New York,—that's what you are sitting under and that's what you have got to to be guided by.

Of course, the laws of the United States in many respects and the Constitutional rights of the defendants apply in any court and I shall do my best to observe all rights of everybody, both the defendant and the People in this case.

Mr. Scotti: Now, your Honor, on behalf of the People I further request that at whatever time the Court chooses to, the Court so decides, to declare before this jury the legal propriety of the action taken by us with respect to the interception of these telephone messages.

The Court: I will note your request and decide whether or not there is need for it, at the proper time.

Mr. Scotti: Thank you, your Honor.

Now, may we proceed, your Honor?

The Court: Yes.

* * * * *

Questions Asked of Petitioner before Grand Jury as to Intercepted Conversations

Q. Did you participate in this conversation which you have just heard played back? (R. 2119.)

Q. Do you recognize Scalise's voice? (R. 2123, 2266, 2315.)

Q. But still you can't tell having heard all the contents, the subject matter of this conversation, the very language used in this conversation, you still can't tell whether you participated in this conversation? (R. 2138.)

Q. Do you remember—see if this refreshes your memory, the other party—was it Scalise? Does it sound like Scalise to you? You heard Scalise's voice? (R. 2139.)

Q. You heard the voice of a man by the name of George, who was called George, in this conversation as in other

conversations. Did you recognize that voice as the voice of George Scalise? (R. 2455.)

"Now, Mr. Saperstein did you have this conversation which you have just heard played back?" (R. 2118.)

"You can't recognize from the contents of this conversation whether you personally participated in this conversation?" (R. 2125.)

"And having heard of the contents of that conversation, that doesn't establish beyond a peradventure of a doubt in your mind that it was you who had this conversation?" (R. 2137.)

"Do you recall Scalise saying in this conversation you just heard—'That nearly blew up again'—What was he referring to?" (R. 2148.)

"Let me ask you, you heard this whole conversation played back. This does not light up in your mind, bring back the subject matter of this conversation so that you are in a position to tell the Grand Jury what the conversation was about?" (R. 2157.)

"You can't tell this Grand Jury what was being conversed about, having heard this conversation?" (R. 2158.)

"In the conversation that was played back did you hear him tell you what to do? Do you deny that?" (R. 2179.)

"The specific question is: You tell us about the union situation involved in this conversation which you have just heard played back?" (R. 2184.)

"• • • having heard this conversation played back to you, you cannot recall what Scalise discussed with you in connection with the procurement of this insurance?" (R. 2202.)

"What did Scalise mean or you mean when you said—what was that reference again—to the Bartender's Union in the Bronx?" (R. 2210.)

"I am asking you, do you recognize that you had had the conversation with George Scalise in this particular

Questions Asked of Petitioner before Grand Jury as to Intercepted Conversations

conversation which you have just heard played back?" (R. 2265.)

"Can you tell us what this conversation was about?" (R. 2309.)

"What sounds familiar in that conversation?" (R. 2370.)

"Well, what was the conversation about, can you tell us?" (R. 2383.)

"Can you tell this Grand Jury what this conversation was?" (R. 2435.)

Motions to Dismiss Indictment

Mr. Turkus: * * * The Defendant moves to dismiss the indictment and each of the counts contained therein, on the ground that the interrogatories put to the defendant with respect to the intercepted telephone conversations were not legal and proper interrogatories.

The evidence sought to be adduced from the defendant as to intercepted telephone conversations between him and another person, would constitute a violation of Sections 605 and 501 of Title 47, United States Code.

While such evidence of intercepted telephone conversations may be admissible in evidence in State Courts, if the witnesses wish to violate the law and give such evidence and run the risk of prosecution therefor, no witness may be compelled to give such evidence and to thereby commit a crime, namely, the violations of Sections 605 and 501 of the United States Code.

The Police Officers and the District Attorney may be willing to assume such risk of prosecution for a federal

crime and to give such testimony. However, they cannot compel the defendant to become a party with them to such a crime.

Unlawfully intercepted telephone conversations may not be testified to by a party to such conversations unless the other party consents. This is clearly established by Federal law, wherein it is stated that the right of a witness to refrain from giving such testimony without the consent of the other party to the conversations, constitutes a privilege and immunity. Privileged communications are not admissible in evidence and may not be inquired into.

To answer the questions as to these intercepted telephone conversations would require the defendant to violate the law, namely, Section 605 and 501 of the United States Code, for which he could be prosecuted. He may not be compelled to do so. No question which, by answering, compels the witness to commit a crime, is a lawful and proper interrogatory.

The Court: The motion is denied.

Mr. Turkus: Exception.

The defendant moves to dismiss the indictment and each of the counts contained therein, on the ground that the enforcement by the State of New York of its statute, compelling the defendant to come into this State and testify with respect to unlawfully intercepted telephone conversations, is an abridgment of the privilege and immunity of the defendant as a citizen of the United States.

The privilege of refraining from testifying as to intercepted telephone conversations is a privilege and immunity granted by Congress, by Section 605 of the United States Code, and is one which the States in the enforcement of their statutes cannot abridge without violating the Fourteenth Amendment of the United States Constitution.

Therefore, the compulsion under State statute of the defendant to testify with respect to said unlawfully inter-

cepted telephone conversations, is a violation of his rights under the Fourteenth Amendment, and the refusal of the defendant to answer such interrogatories was, therefore, entirely valid and cannot be made the basis of any charge of contempt.

The Court: The motion is denied.

Mr. Turkus: Exception. The defendant moves to dismiss the indictment and each of the counts contained therein, on the ground that the compulsion of the defendant to testify as to the intercepted telephone conversations on penalty of indictment and conviction of contempt, is a denial to the defendant of due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and Article I, Section 6, of the Constitution of the State of New York.

The District Attorney of New York County, by compulsion of process, has reached into another State and brought this defendant, over his objection, to New York State, to testify as a witness in a criminal proceeding pending therein.

He did so by virtue of Section 618-A, Subdivision 3, of the Code of Criminal Procedure, which is an enactment of the Uniform Act to Secure the Attendance of Witnesses Without the State, in criminal proceedings, popularly known as the Reciprocal Witness Act.

To obtain such order, the District Attorney represented to the Courts of New York and New Jersey that the defendant was a material witness in such criminal proceedings. He did not disclose or represent that the witness would be required by such order to come into the State of New York to testify with respect to unlawfully intercepted telephone conversations.

When the witness, the defendant herein, appeared before the Grand Jury and was asked to give evidence with respect to these illegally intercepted telephone conversa-

tions, he was placed in this position: If he answered, he committed a crime, a violation of Sections 605 and 501, United States Code, for which he could be prosecuted; if he refused to answer, he would be indicted for criminal contempt.

What the District Attorney has done, in effect, is this: Having himself committed the Federal crime of intercepting and divulging these telephone calls, he reaches out into another State to make one of the senders particeps criminis with him.

This is not a question of compulsion against self-incrimination with respect to some past act committed by the witness. It is a question of an abusive process by which the witness will be compelled by the act of complying therewith to commit a crime.

A question which, if answered, renders the witness a criminal, or if not answered, renders him subject to conviction of contempt, is not due process of law, it is a violation of a fundamental conception of what is just, fair and right, and does not satisfy the requirements of due process of law.

The violation of the privilege against testifying with respect to intercepted telephone conversations, is so grave a dereliction as to be destructive of personal liberty.

Therefore, the compulsion of the defendant to testify with respect to these intercepted telephone conversations, violates due process of law, and the defendant cannot be compelled to answer with respect to these telephone conversations, and his refusal to do so cannot be made the basis of a criminal contempt.

The Court: The motion is denied.

Mr. Turkus: Exception.

Defendant's Requests to Charge

(Following are the defendant's requests to Charge, as hereinbefore acted upon by the Court:)

1. That the interception and divulgence of telephone conversations without the consent of the parties to said conversations is a crime under the Federal Law.

2. That in intercepting and divulging the contents of the telephone conversations which were offered in evidence before the Grand Jury in this case, the police and District Attorney and other persons who participated in such interception and divulgence of said telephone conversations committed a crime under the Federal Law for which they could be prosecuted.

3. That the District Attorney and the police cannot, by purported legal process or otherwise, compel a party to such intercepted telephone conversations to divulge the contents thereof without the consent of the other party, and thereby to join with the District Attorney and the police in the commission of a crime under the Federal Law.

4. If in order to answer a question with respect to intercepted telephone conversations the defendant would commit a crime under the Federal Law, such questions are not legal and proper interrogatories before the Grand Jury and the defendant in such case must be acquitted.

5. That by act of Congress (Sections 605 and 501, United States Code) a party to an intercepted telephone conversation is given a privilege and immunity against divulging the contents of said conversation without the consent of the other party thereto, and a breach of such privilege constitutes a crime. Any question designed to elicit testimony from such party to such privileged communication is not a legal and proper question.

Rulings and Exceptions on Requests to Charge

The Court: I have now been handed by defense counsel certain requests to charge, numbered 1 to 44, which will be marked in evidence as Court's Exhibit 2.

(The requests to charge were thereupon marked Court's Exhibit 2 in evidence, and are hereinafter appended.)

The Court: I shall now read them and rule on them. I shall not read them aloud until I decide what to do with them.

Request No. 1, I decline to charge.

Mr. Turkus: Exception.

The Court: I will follow that by saying I decline to charge it because it has no application in this case.

No. 2 I decline to charge because I believe it has no application in this case.

Mr. Turkus: I respectfully except.

The Court: No. 3 I decline to charge because I believe it has no application in this case.

Mr. Turkus: I respectfully except.

The Court: No. 4 I decline to charge because I believe it has no application in this case.

Mr. Turkus: I respectfully except.

The Court: No. 5 I decline to charge because I believe it has no application in this case.

Mr. Turkus: I respectfully except.

Certificate of Court of General Sessions for Petitioner as Witness from New Jersey Under Reciprocal Witness Statute

COURT OF GENERAL SESSIONS

COUNTY OF NEW YORK

In the Matter

of

The Investigation by the Fourth November 1953 Grand Jury entitled "THE PEOPLE OF THE STATE OF NEW YORK

—against—

JOHN DOE."

Upon reading the annexed affidavit of ALFRED J. SCOTTI, Assistant District Attorney of the County of New York and Chief of the Rackets Bureau of the District Attorney's Office of the County of New York, sworn to on February 24, 1954, and pursuant to Section 618-a of the Code of Criminal Procedure of the State of New York (Chapter 387 of the Laws of 1936).

I, SAUL S. STREIT, Judge of the Court of General Sessions of the County of New York, do hereby certify,

First: The Court of General Sessions of the County of New York is a Court of record of the State of New York.

Second: The District Attorney of New York County has been conducting before the Fourth November 1953 Grand Jury of the County of New York an investigation, bearing the above title, of the insurance welfare funds of certain labor unions and the activities of certain insurance agents who placed with various insurance carriers con-

Certificate of Court of General Sessions for Petitioner as Witness from New Jersey Under Reciprocal Witness Statute

tracts of life, accident and health insurance for the benefit of members of various labor unions. The said Grand Jury seeks to determine whether the commissions received by the said insurance agents were or are being split with certain labor union officials and other unauthorized persons, in violation of Sections 5 and 113 of the Insurance Law of the State of New York, and whether the said various insurance agents have bribed or are bribing or have conspired or are conspiring with others to bribe the said various labor union officials, in violation of Sections 380 and 580 of the Penal Law of the State of New York.

Third: Louis B. Saperstein, now present in the State of New Jersey, is a material and necessary witness in the said Grand Jury investigation. Information available to the District Attorney of New York County establishes that the said Louis B. Saperstein, now residing at 65 Spier Drive, South Orange, New Jersey, has been engaged in business as an insurance agent for a number of years and is presently conducting such a business at 1026 Broad Street, Newark, New Jersey.

It has been further established that the said Louis B. Saperstein, individually and through one or more incorporated insurance agencies with which he has been connected, has placed with various insurance carriers contracts of life, accident and health insurance for the benefit of members of various labor unions in the County of New York, including, but not limited to, the Wholesale Licensed Alcoholic Beverage Salesmen's Union, otherwise known as Local 2 of the Distillery, Rectifying and Wine Workers' International Union of America, A. F. of L., located at 250 West 57th Street, County, City and State of New York.

In line with the objects of the said investigation it is necessary that the said Louis B. Saperstein appear before

the said Grand Jury to determine whether violations of the Penal Law and the Insurance Law of the State of New York, as specified above, have been or are being committed in connection with any contracts of life, accident and health insurance placed for the benefit of members of various labor unions in the County of New York by the said Louis B. Saperstein or any of the incorporated insurance agencies with which he is connected.

Fourth: The following books and records of account of the said Louis B. Saperstein are likewise material and necessary to the said investigation:

Check stub books;
Bank statements and cancelled checks;
in addition to the foregoing, all papers, books, documents, records and data pertaining to and concerning any contracts of life, health and accident insurance placed with various insurance carriers on behalf of members of labor unions located in the County of New York;

all of the above from January 1, 1950, to December 31, 1953, inclusive.

Fifth: The presence of the said Louis B. Saperstein together with the above-enumerated books and records of account will be required before the said Grand Jury beginning on March 2, 1954, at ten o'clock in the forenoon, and from day to day thereafter on the order of the foreman of the said Grand Jury, until he shall have completed his testimony, but for a period not exceeding fourteen days from the date of his first appearance, at the Criminal Courts Building, 155 Leonard Street, in the County, City and State of New York.

Certificate of Court of General Sessions for Petitioner as Witness from New Jersey Under Reciprocal Witness Statute

Sixth: The attendance of the said Louis B. Saperstein before the said Grand Jury cannot be ensured voluntarily.

Seventh: It will not cause undue hardship to the said Louis B. Saperstein to attend and testify before the said Grand Jury together with the above-enumerated books and records of account.

Eighth: The laws of the State of New York will give to the said Louis B. Saperstein, while in the State of New York in obedience to an order directing him to attend and testify before the said Grand Jury in New York, protection from arrest and the service of process, civil or criminal, in connection with matters which arose before his entrance into New York under such order.

(Seal)

SAUL S. STREIT
Judge of the
Court of General Sessions

Done and Sealed in the Court of General Sessions of the County of New York, State of New York, the 24th day of February, 1954.

ATTEST:

F. HOWARD BARRETT
Clerk of the
Court of General Sessions

(Seal)

Affidavit of District Attorney for Certificate Under Reciprocal Witness Statute

COURT OF GENERAL SESSIONS

COUNTY OF NEW YORK

In the Matter

of

The Investigation by the Fourth November 1953 Grand Jury entitled "THE PEOPLE OF THE STATE OF NEW YORK

—against—

JOHN DOE."

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

ALFRED J. SCOTTI, being duly sworn, deposes and says:

I am an Assistant District Attorney in and for the County of New York and Chief of the Rackets Bureau of the District Attorney's Office of New York County.

The District Attorney of New York County has been conducting before the Fourth November 1953 Grand Jury of the County of New York an investigation, bearing the above title, of the insurance welfare funds of certain labor unions and the activities of certain insurance agents who placed with various insurance carriers contracts of life, accident and health insurance for the benefit of members of various labor unions. The said Grand Jury seeks to determine whether the commissions received by the said insurance agents were or are being split with certain labor union officials and other unauthorized persons, in violation of Sections 5 and 113 of the Insurance Law of the State

Affidavit of District Attorney for Certificate Under Reciprocal Witness Statute

of New York, and whether the said various insurance agents have bribed or are bribing or have conspired or are conspiring with others to bribe the said various labor union officials, in violation of Sections 380 and 580 of the Penal Law of the State of New York.

I have been informed that one Louis B. Saperstein, now residing at 65 Spier Drive, South Orange, New Jersey, has been engaged in business as an insurance agent for a number of years and is presently conducting such a business at 1026 Broad Street, Newark, New Jersey.

It has been further established that the said Louis B. Saperstein, individually and through one or more incorporated insurance agencies with which he has been connected, has placed with various insurance carriers contracts of life, accident and health insurance for the benefit of members of various labor unions in the County of New York, including, but not limited to, the Wholesale Licensed Alcoholic Beverage Salesmen's Union, otherwise known as Local 2 of the Distillery, Rectifying and Wine Workers' International Union of America, A. F. of L., located at 250 West 57th Street, County, City and State of New York.

In line with the objects of the said investigation it is necessary that the said Louis B. Saperstein appear before the said Grand Jury to determine whether violations of the Penal Law and the Insurance Law of the State of New York, as specified above, have been or are being committed in connection with any contracts of life, accident and health insurance placed for the benefit of members of various labor unions in the County of New York by the said Louis B. Saperstein or any of the incorporated insurance agencies with which he is connected.

In view of the foregoing, it is respectfully submitted that the said Louis B. Saperstein is a material and necessary

witness in said Grand Jury investigation and that the following books and records of account of Louis B. Saperstein likewise are necessary and material to the said investigation:

Check stub books;
Bank statements and cancelled checks;
in addition to the foregoing, all papers, books, documents, records and data pertaining to and concerning any contracts of life, health and accident insurance placed with various insurance carriers on behalf of members of labor unions located in the County of New York;

all of the above from January 1, 1950, to December 31, 1953, inclusive.

The District Attorney of New York County is desirous of obtaining the appearance of the said Louis B. Saperstein before the said Grand Jury, together with the above-enumerated books and records of account. Since the said Louis B. Saperstein is in the State of New Jersey, his presence in New York cannot be ensured voluntarily, nor can the usual process of Grand Jury subpoena be available to the District Attorney to ensure his presence before the said Grand Jury.

It is respectfully submitted that it will not cause undue hardship to the said Louis B. Saperstein to attend and testify before the said Grand Jury together with the above-enumerated books and records of account.

I, therefore, respectfully request that this Court, pursuant to Section 618-a of the Code of Criminal Procedure of the State of New York (Chapter 387 of the Laws of 1936), issue a certificate under the seal of this Court certifying to the courts of the State of New Jersey that the

Affidavit of District Attorney for Certificate Under Reciprocal Witness Statute

said Louis B. Saperstein is a material and necessary witness in the said Grand Jury investigation and that he will be required to attend and testify before the said Grand Jury beginning on March 2, 1954, at 10 o'clock in the forenoon, and from day to day thereafter on the order of the foreman of the said Grand Jury, until he shall have completed his testimony, but for a period not exceeding fourteen days from the date of his first appearance, at the Criminal Courts Building, 155 Leonard Street, in the County, City and State of New York.

I further request that the certificate state that the above-enumerated books and records of account of Louis B. Saperstein are material and necessary to the said investigation and they will be required before the said Grand Jury at such times as Louis B. Saperstein is directed to appear personally before the said Grand Jury.

I further respectfully request that the certificate applied for herein upon issuance be authorization to me to reveal the subject of the said investigation to the extent set forth herein.

No previous application for this relief has been made to any court or judge.

ALFRED SCOTTI

Sworn to before me this
24 day of February, 1954.

FRANK J. GOES

Order of Essex County Court, New Jersey, Under Reciprocal Witness Statute

At a term of the County Court of Essex County (Law Division-Criminal), held at the Essex County Courthouse, City of Newark, State of New Jersey, on the 26th day of February, 1954.

Present:

HONORABLE JOSEPH E. CONLON,

Judge.

In the Matter

—of—

The Application of the People of the State of New York for an Order Requiring One

LOUIS B. SAPERSTEIN, TOGETHER WITH CERTAIN BOOKS AND RECORDS

to Appear as a Witness Before the Grand Jury of the County of New York, State of New York.

Upon a hearing had before me this day in the County Court of Essex County (Law Division-Criminal), of the State of New Jersey, Essex County, on the annexed certificate, dated February 24, 1954, of Honorable Saul S. Streit, Judge of the Court of General Sessions of the County of New York, a court of record of the State of New York for the transaction of criminal business; and it appearing that there is a Grand Jury investigation, a criminal proceeding, now pending in the said Court of General Sessions of the County of New York, entitled "The People

Order of Essex County Court, New Jersey, Under Reciprocal Witness Statute

of the State of New York v. John Doe," and that in such Grand Jury investigation Louis B. Saperstein, residing at 65 Spier Drive, South Orange, New Jersey, County of Essex, State of New Jersey, is a material and necessary witness, and that certain of his books and records of account are likewise necessary and material to said proceeding; and after hearing Louis B. Saperstein, now before me; and it further appearing that the States of New York and New Jersey have made reciprocal provisions in their laws for securing the attendance of witnesses from within and without the respective states in criminal proceedings, to wit, in the State of New York, Section 618-a of the Code of Criminal Procedure, and in the State of New Jersey, New Jersey Statutes 2A:81-18 et seq.; and it further appearing that the laws of the State of New York provide that such a witness will be exempt from arrest and service of process, criminal and civil, while in the State of New York in obedience to an order directing him to appear and testify in New York in accordance with the Uniform Reciprocal Witness Act; and it further appearing that it will not cause undue hardship to the said Louis B. Saperstein to attend and testify in the State of New York; and that proper witness fees have been tendered,

I, Joseph E. Conlon, a Judge of the County Court of Essex County (Law Division-Criminal) of the State of New Jersey, Essex County, do herein order and direct Louis B. Saperstein, together with his following books and records of account, to attend and testify before the Grand Jury of the County of New York, at 155 Leonard Street, County, City and State of New York, commencing on March 2, 1954, at 2 o'clock in the afternoon, and from day to day thereafter on the order of the foreman of the said Grand Jury, until he shall have completed his testi-

mony, but for a period not exceeding fourteen days from the date of his first appearance:

Check stub books;
bank statements and cancelled checks;
in addition to the foregoing, all papers, books, documents, records and data pertaining to and concerning any contracts of life, health and accident insurance placed with various insurance carriers for the benefit of members of labor unions located in the County of New York,

all of the above from January 1, 1950, to December 31, 1953, inclusive.

JOSEPH E. CONLON
Judge of the County Court of Essex County, of the State of New Jersey

Order of Court of General Sessions Granting Motion for Special Jury

At a Trial Term of the Court of General Sessions of the County of New York held at the Criminal Courts Building, in the Borough of Manhattan, City and County of New York, on the 26 day of May, 1954.

Present:

HONORABLE JOHN A. MULLEN,

Judge.

Order. Indictment No. 1663-54

THE PEOPLE OF THE STATE OF NEW YORK

—against—

LOUIS B. SAPERSTEIN,

Defendant.

An indictment having been found in the Court of General Sessions of the County of New York against the above named defendant, on May 13, 1954, charging him with the crimes of CRIMINAL CONTEMPT, and an issue of fact having arisen upon said indictment, and upon the plea of Not Guilty thereto entered by said defendant, on May 17, 1954, in Part I of this Court, and the District Attorney of the County of New York having applied for a special jury to try said issue pursuant to law and the District Attorney of the County of New York having appeared in support of said motion, and Burton B. Turkus, Esq., of counsel for the defendant, having appeared in opposition thereto;

Now, upon reading and filing the notice of application herein and the affidavit of Alfred J. Scotti, Assistant Dis-

Order of Court of General Sessions Granting Motion for Special Jury

trict Attorney, duly sworn to on May 20, 1954, thereto annexed, and upon the indictment against the defendant herein filed in the office of the Clerk of the Court of General Sessions of the County of New York on May 13, 1954, and the plea of Not Guilty entered by the defendant on May 17, 1954, and it appearing to my satisfaction that by reason of the facts stated in the moving papers an ordinary jury cannot be obtained without delay and difficulty to try said issue, and that by reason of said facts, the due, efficient and impartial administration of justice in this case will be advanced by the trial of said issue by a special jury;

Now, on motion of Frank S. Hogan, District Attorney of the County of New York, it is hereby

ORDERED, That said application be, and the same hereby is, granted, and that said issue of fact in said criminal action between the People of the State of New York and the above named defendant on said indictment, and the defendant's plea thereto, to be tried before a special jury drawn and selected pursuant to law, and it is further

ORDERED, That the drawing of said special jury take place in the Office of the County Clerk of the County of New York, on June 1, 1954, at 10:30 o'clock in the forenoon of that day, and that one hundred fifty (150) special jurors be thus drawn for the trial of said issue as aforesaid; and it is further

ORDERED, That said special jurors so drawn shall attend at Part VIII, of the Court of General Sessions of the County of New York, in the Borough of Manhattan, City and County of New York at ten o'clock in the forenoon of June 15, 1954, for the trial of said issue.

ENTER,

JOHN A. MULLEN
J.C.G.S.

Amended Order

At a Trial Term of the Court of General Sessions of the County of New York held at the Criminal Courts Building, in the Borough of Manhattan, City and County of New York, on the 28th day of May, 1954.

Present:

HONORABLE JOHN A. MULLEN,

Judge.

Indictment No. 1663—54

THE PEOPLE OF THE STATE OF NEW YORK

—against—

LOUIS B. SAPERSTEIN,

Defendant.

An order having been entered by this Court (by Mullen, J.) on May 26, 1954, directing that a drawing of a special jury take place in the office of the County Clerk of the County of New York, on June 1, 1954, at 10:30 o'clock in the forenoon of that day; that one hundred and fifty (150) special jurors be thus drawn to try the issue of fact between the People of the State of New York and the defendant under the above-entitled indictment; and that the special jurors so drawn shall attend at Part VIII of the Court of General Sessions of the County of New York, in the Borough of Manhattan, City and County of New York, at ten o'clock in the forenoon, June 15, 1954, for the trial of said issue, it is

ORDERED, That, on consent of the People of the State of New York and the defendant, the said order be and hereby

is amended and modified to direct the attendance of the said special jurors on June 21, 1954, at the place set forth in the said order.

ENTER,

JOHN A. MULLEN
J.C.G.S.

Affidavit in Opposition to Motion for Special Jury

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

BURTON B. TURKUS, being duly sworn, deposes and says:

I am the attorney for the defendant and make this affidavit in opposition to the application of the District Attorney for a Special Jury.

To here order trial by Special Jury may deprive the defendant of a neutral jury. It is common knowledge that District Attorneys in several counties of the City of New York possess and maintain a card index or other record concerning each juror who has served on a Special Jury. Such record invariably lists the background of the special juror, the cases in which he has been called to serve as well as those in which he actually participated, and the vote of the jury in each particular case. Thus, if he is successful in securing a Special Jury, the District Attorney will by such records know which of said special jurors have voted for conviction, and those who have voted for acquittal in prior cases.

Affidavit in Opposition to Motion for Special Jury

Such records are in the control of the District Attorney, intended for the eyes of the trial prosecutor only. Accordingly by the use of peremptory challenges, the District Attorney may exclude from the jury such special juror who may have heretofore voted for an acquittal (in a prior case) and select those who have heretofore voted for conviction.

To permit, advance or countenance the selection of a jury in such manner would be calculated to deprive the defendant of a neutral jury and a fair and impartial trial which is his constitutional right and protection, as guaranteed under the due process clause of both State and Federal Constitutions.

There is no voting record of regular jurors. Regular jurors are not likely to feel that they are brought into Court for a special mission. There is no highlighting of the cause in the minds of such jurors or the cue or signal to them of special cases of unique and grave import to the public and which necessitates their special services.

The defects of the moving papers in establishing the required factual showing of special circumstances and real and genuine necessity for a trial of the instant indictment by Special Jury; the inequities and prejudice to the defendant in securing a neutral jury, and a fair and impartial trial by Special Jury in derogation of his constitutional rights, and the other grounds here stated, it is respectfully urged warrants and requires a denial of the application in the sound discretion of the Court.

BURTON B. TURKUS

Sworn to before me this
24th day of May, 1954.

DAVID NISSENBAUM
Notary Public for the State of New York

Excerpts from Record Concerning Objections to Special Jury

* * * * *

(The following proceedings were had out of the presence and hearing of the jurors:)

Mr. Turkus: May it please your Honor, I desire to supplement the record with respect to our opposition to a Special Jury in this case, the order for which was made by your Honor over our objection. There are some—

Mr. Brenner: If you indulge me for one moment, I shall count the various folders which I have before me, the folders which contain information which was made available to Mr. Turkus in connection with the selection of the Special Panel.

The Court: All right.

(Mr. Brenner counts the folders.)

Mr. Brenner: Fifty-five. There are 55 such folders.

Mr. Turkus: And those folders, I understand, contain the background and voting records and all information that the District Attorney has with respect to this panel of Special Jurors, is that correct?

Mr. Brenner: In addition to these folders, there is an additional source of information with respect to Special Jurors. There is, in the Homicide Bureau of the District Attorney's Office, a metal file which contains index cards, one card for an individual juror. There, of course, was not a card for each member of the Special Panel in this case. There were cards for only some members of the Panel. Those cards are not portable, in the sense that they are kept locked at all times in this metal file. The records in that file, insofar as they relate to the members of this Special Panel, have been made available to Mr. Turkus pursuant to the order of this Court.

Excerpts from Record Concerning Objections to Special Jury

Mr. Turkus: Well, is there a copy of it in these folders which we are marking for identification?

Mr. Brenner: No. There are two sources of information: One are the cards contained in the file cabinet which I referred to. The second source are the 55 folders which I have just mentioned.

The Court: The 55 folders we have now marked for identification. Is there any way there can be marked for identification the cards from this steel file in the Homicide Bureau?

Mr. Brenner: Now, may I say this—and off the record, please?

(Thereupon, Mr. Brenner made a statement to the Court, which was off the record.)

The Court: I intend there should be made available to the defense counsel all facts on which the District Attorney or defense counsel could make up their minds as to whether or not—

Mr. Scotti: (interrupting) Your Honor, I think we have complied with the letter and spirit of the Judge's order when we made all of these records available to Mr. Turkus. His assistant came down and was escorted by Mr. Brenner to this particular source of information. Now,—

The Court: Mr. Brenner, when Mr. Turkus's assistant came to the Homicide Bureau of the District Attorney's Office, to get access to these files, how was access given to him?

Mr. Brenner: I wish to clarify that.—

Mr. Turkus: If you let me, Judge—we don't make any contention that the District Attorney withheld any information from us. All I want available, to be marked for identification, is that in the event it becomes necessary to at-

tack the designation by the Court of a Special Jury, that these records in possession of the prosecutor may be available for another court to view. Do you understand me?

Mr. Brenner: Judge, I have a perfect solution to that. Since these cards in the file cabinet are not transportable, I think we can do this: I can in a very few moments give Mr. Turkus the names of those jurors on this panel for which cards have been made out.—

The Court: In the Homicide Bureau?

Mr. Brenner: Yes. And then, having this list of names, we can total them.

Mr. Turkus: Well, you can put on a sheet of paper—it will be marked for identification—showing the list of names of the Special Jurors that there is this file system on. Then if anybody ever wants to review them, they would have a right to.

Mr. Scotti: I object to this, your Honor. I think he is creating a very unfair precedent. These are private, confidential records of the District Attorney's Office. We made them, gratuitously, available to him. Those are confidential matters he had. And we trusted him to the extent he would disregard any opinions that were written on these records. —Am I correct, Mr. Brenner?

Mr. Turkus: Wait. Mr. Scotti is incorrect in this—

The Court: (interrupting) First, was Mr. Turkus's assistant given access to the cards in its entirety?

Mr. Brenner: This is precisely what happened, Judge: Referring now to one source of information, the trial cards only,—

The Court: Yes?

Mr. Brenner: —I went to the file cabinet, I took out the cards, and I compiled all the information contained on the cards in an alphabetical list. I then gave that list to Mr. Turkus's assistant. He copied all the information

from that. And then, in order to satisfy himself that my search had been thorough and accurate, I escorted him to the Homicide Bureau. He picked out several names from the list of jurymen on the panel, and he made a spot check. He called out a name, I took the corresponding card from the file, or in the event that there was no card for the particular name he called out, I made that fact physically evident to him.

The Court: Was that a suggestion of Mr. Turkus's assistant?

Mr. Brenner: That was a suggestion on Mr. Turkus's assistant's part, and I complied with it. And at the conclusion of our dealings in that connection, I asked him "Are you perfectly satisfied now with the search?" And he replied, "I am more than satisfied."

Mr. Turkus: Judge, may I reiterate: there is no—

The Court: Just a moment. That is not what I am interested in. I am interested in what the record is here, and keeping it straight.

Who is Mr. Turkus's assistant?

Mr. Turkus: Mr. Martin Lichter.

The Court: I want Mr. Martin Lichter in court here, to complete this record as to what degree my direction to the District Attorney to make available to you all data which they possess, was complied with.

Mr. Turkus: I don't think you understand me, Judge. There is no challenge on that point. There is no claim advanced that your order to give me this data was disobeyed by the District Attorney. All I want available, on the basis of a review, is these matters to be marked for identification, so that another court may look at them.

Mr. Scotti: For what purpose?

Mr. Turkus: I will make it very, very clear to you. I object to the designation of a Special Jury in this case,

among other grounds, that these were Special Jurors where there was a background on each one maintained by the District Attorney. Now, I want an appellate court—because this has been passed on by the United States Supreme Court on the basis of a five-to-four decision,—

The Court: That's right.

Mr. Turkus: —and they may want to review all the data that a prosecutor keeps and maintains with respect to the Special Jurors, to see whether it's wise that this Special Jury system be continued.

The Court: And I am sure that any reviewing court, if there ever should be one, will be interested in knowing how a prosecutor uses that information, whether it be to the disadvantage of a defendant or not. That will be a very important factor in determining whether or not it was due process of law to permit such a practice to continue. Now, five Judges of the United States Supreme Court did approve of it, in the Fay-Bove case.—

Mr. Scotti: But on entirely different grounds, your Honor.

The Court: —Four disagreed.

Mr. Scotti: It wasn't on the basis he now raises.

The Court: No.

Mr. Scotti: Entirely different.

Mr. Turkus: I am covered on my motion. I made—my opposition is replete with all our grounds of my objection to the Special Jury. I am merely completing the record.

The Court: To complete your record, I want your assistant in here. Let him state on the record whether or not he got from Mr. Brenner every cooperation—

Mr. Turkus: There is no dispute of that. My assistant told me he got every co-operation from Mr. Brenner. Why be annoyed in bringing him here?

Excerpts from Record Concerning Objections to Special Jury

Mr. Scotti: Does Mr. Turkus maintain at the present time that certain information was held from him?

Mr. Turkus: It was not. I am trying to tell you. I am trying to tell you four times, but nobody appears to understand me.

Mr. Scotti: I don't understand your point.

The Court: What do you want?

Mr. Turkus: We have a portion of the records marked for identification.—

The Court: We have marked for identification the folders.

(The 55 folders previously referred to were marked People's Exhibit 13 for Identification.)

The Court: People's Exhibit 13 for Identification. Those are the folders,—

Mr. Brenner: I would describe them as manila folders, open on three sides, containing papers and other documents with information concerning an individual whose name appears printed on the outside of the folder.

The Court: —Which individual is a member of the Special Panel of Jurors drawn in this case, from which there was selected the jury?

Mr. Turkus: That's right. Now, does that 55 folders contain all of the folders of that type, with regard to this Special Panel?

Mr. Brenner: Let me be precise about it. These are all the folders which, to my knowledge, exist. Now, I want to just add one sentence, to make sure everything is completely understood: I found, in examining on the voir dire, that certain members of the panel, about whom we had no information, had had prior service. So I want to say merely this: It would be possible, and it may have happened in

this case, that if a member of the panel had his name misspelled as I received it, there would have been no folder which I had seen, and therefore Mr. Turkus wouldn't have seen it. So, in one sentence, Mr. Turkus has had made available to him everything which the District Attorney's Office has seen, itself.

Mr. Scotti: And everything that we saw. That's important.

The Court: Did that include the information in the Homicide Bureau?

Mr. Brenner: That includes both sources of information.

The Court: Everything in the District Attorney's Office?

Mr. Brenner: Everything that I have ever seen or heard of, and Mr. Scotti, has been available and inspected by Mr. Turkus or his assistant.

The Court: With respect to the panel of jurors drawn to select the trial jury in this case?

Mr. Brenner: That's right.

Mr. Turkus: I would like to have marked for identification a sheet, to be prepared by the District Attorney, listing the names of the members of the Special Jury upon whom the Homicide Bureau maintains this metal card index which is not removable.

Mr. Scotti: I think your assistant has that. He has the list. Show us the list, and we'll agree to it. Mark it for identification.

The Court: Let us have prepared and marked for identification photostatic copies of these cards in the Homicide Bureau's steel cabinet to which we have referred. Apparently there are not so many of them as there are folders here.

Mr. Scotti: About 50 cards, your Honor.

You want us to photostat 50 cards?

The Court: I would. I have them made available, in the event that they should ever become—

Excerpts from Record Concerning Objections to Special Jury

Mr. Scotti: (interrupting) But I object, your Honor, on behalf of the District Attorney's Office: because those cards contain confidential matter—opinions.

The Court: My dear Mr. Scotti, these cards may never become of interest to anybody. But if and when they do, the photostating of 50 cards is infinitestimal compared to the providing of proper authority with all information on the operation of the Special Panel in the Court of General Sessions.

Mr. Turkus: Thank you.—Do you still want my assistant to come up? I don't see any necessity—

Mr. Scotti: I insist that his assistant come up, your Honor, and make a record of the kind of co-operation we extended here.

Mr. Turkus: We concede we got full co-operation.

Mr. Scotti: I want it from your assistant.

Mr. Turkus: He told me that.

The Court: I know, but I want him, to make the record. As you pointed out yourself, this is a matter on which the United States Supreme Court has ruled. Now, if it ever again should be called upon to pass upon the matter, I want to have as fully as possible before them the operation of the system and the manner in which the District Attorney conducted himself.

Mr. Scotti: Yes, your Honor.

Mr. Turkus: All I can say is this: my assistant told me that he was treated most kindly, and given every co-operation and courtesy by Mr. Scotti and Mr. Brenner.

The Court: I appreciate that, but tell him to come down here.

Mr. Turkus: I don't know if he is trying a case, but I will ask him to come down tomorrow.

* * * * *

Excerpts from Record Concerning Objections to Special Jury

(Thereupon, the jury left the Court room, and the following was at the Bench, out of the hearing and presence of the jury:)

(Mr. Martin Lichter, an associate of Mr. Turkus, was at the Bench with other counsel.)

Mr. Turkus: May it please Your Honor, pursuant to Your Honor's direction, I have asked my assistant, Martin Lichter, Esq., to come here and he stands now before the Bench.

The Court: Mr. Lichter, in the course of the preliminaries to this trial and in connection with the selection of a jury from a so-called Special Panel, Mr. Turkus requested that there be made available to the defense all information that the District Attorney had respecting any of the persons called on the panel from which the petit jury would be selected.

I am informed that you went to the District Attorney's office to get that information, is that correct?

Mr. Lichter: That is right.

The Court: Now, whom did you confer with at the District Attorney's office?

Mr. Lichter: I conferred with Mr. Brenner, Mr. Scotti's associate.

The Court: Mr. Brenner said you suggested there were two sources of information, one, certain folders with respect to certain talesmen on the panel, and secondly, certain cards in the Homicide Bureau of the District Attorney's office, with respect to other members of the panel.

Mr. Brenner: Or, in many cases, the same, Your Honor.

The Court: Or in some instances, there were both sources of information with respect to the same juror. Did Mr. Brenner acquaint you with that fact?

Excerpts from Record Concerning Objections to Special Jury

Mr. Lichter: Yes, Mr. Brenner made available to me the files of his Department, Mr. Scotti's Department, which consisted of folders with many of the talesmen, information on the talesmen. He also made available to me a list of the talesmen which were extracted from the Homicide Bureau cards, which he told me were exact quotations of the cards in the files of the Homicide Bureau, and he said to save time it would be better if I would copy that list.

I said I would, if he would allow me to spot-check the Homicide cards themselves against the list, which he agreed to.

The Court: Now, he said that on those homicide cards there were in certain instances opinions written by the District Attorney with respect to the District Attorney's opinion as to the talesmen, prospective jurors, and that those opinions were not given to you, but all the facts on which those opinions—

Mr. Brenner: No, Your Honor, the opinions were also given to him.

The Court: Oh, were they?

Mr. Brenner: Everything was given to him.

The Court: Oh, the opinions also? I am sorry, I misunderstood you. He said on those cards in the Homicide Bureau were also written opinions of the District Attorney with respect to the availability of that talesman as a satisfactory juror.

Mr. Lichter: They were opinions such as the word "Good", or "Fair", and—

The Court: Yes.

Mr. Lichter: And Mr. Brenner informed me they were notations made by the Assistant District Attorney in that particular instance.

The Court: In the Homicide Bureau?

Mr. Lichter: That's right.

Excerpts from Record Concerning Objections to Special Jury

The Court: Were those made available to you also?

Mr. Lichter: Yes.

The Court: When you got through with your investigation, did you have any reason to believe that the District Attorney had any information with respect to any talesman which had not been made available to you?

Mr. Lichter: No, I had no reason to believe that. I had no reason to know either, Your Honor, no way of knowing.

The Court: That's why I put the question, did you have any reason to believe?

Mr. Lichter: No, I didn't have any reason to believe.

The Court: Because Mr. Brenner has already said that he made available to you all of the information which was in the District Attorney's office, with the exception of the rating of "Good", "Bad," or "Fair."

Mr. Brenner: That too was made available.

Mr. Lichter: That was made available also.

Mr. Brenner: Let me make the record clear.

The Court: I thought you said yesterday that was made available only with respect to those that were spot-checked?

Mr. Brenner: No, Your Honor, I want the record to be absolutely clear.

The Court: Very well.

Mr. Brenner: The index cards contained in the file in the Homicide Bureau in some instances contained comments and in other instances they did not.

The Court: That is, comments with respect to the opinion of the District Attorney?

Mr. Brenner: Yes.

The Court: Good, bad, or fair material?

Mr. Brenner: Yes, Your Honor. Now, in all cases, those index cards did contain a record of prior jury service which may or may not have been completely accurate.

The Court: Yes.

Excerpts from Record Concerning Objections to Special Jury

Mr. Brenner: The point is, however, that every single word which was contained on every card where a card could be found for a member of the panel, every word was made available to Mr. Lichter.

The Court: Even including—

Mr. Brenner: Including the opinion.

The Court: Including the opinions and rating, let's call them, in the opinion of the District Attorney.

Mr. Brenner: Exactly, whatever was on that card was made available.

The Court: Oh, you made available to Mr. Lichter every bit of information which you had in your office concerning each man on that panel?

Mr. Brenner: I wish to point out one further thing. I have spoken now with respect to the index cards, with respect to the other source of information, namely, the open and closed folders. Those folders, for the most part, contained opinions.

The Court: I see.

Mr. Brenner: In other words, the index cards are confined for the most part to recorded, or to a record of prior jury service, with occasional comments of the evaluation of the juror.

The Court: Information of the Assistants in the Homicide Bureau.

Mr. Brenner: No, or any other Bureau, where they had a Special Panel, but the open folders were for the most part confined to opinions, although they also contained some segment of the facts, either prior service, address, or what have you.

Mr. Turkus: May I add—

The Court: Is that correct, Mr. Lichter?

Mr. Lichter: Yes.

Mr. Turkus: May I add something? There is no ques-

tion in my mind that Mr. Brenner turned over to Mr. Lichter every fact and everything that he could lay his hands on, that Mr. Brenner could, I have complete confidence in the integrity of Mr. Brenner, and I believe every word he has said in that connection.

Mr. Lichter has advised me that Mr. Brenner was most co-operative with him and me. Isn't that correct?

Mr. Lichter: That's correct.

The Court: Mr. Turkus, I am making this record because I think that more so-called Special Jury panels are called in the Court of General Sessions than in any Court in the State of New York.

I believe that Judges who might have occasion to review this whole situation might be unfamiliar with the manner in which the law is applied, and I want the record to be full with respect to the application of the law in this County, for whatever use such information would be to such Judges, if they do want to see it.

Mr. Turkus: I did want to make it completely clear that we at all times felt that Mr. Brenner is a gentleman of high integrity and we in no way question,—that is, I had no question in my mind at any time, and I am rather regretful, if that portion of the record should be made, because I wouldn't want it to be taken by anybody that I was in any way suspicious of him.

Mr. Brenner: I appreciate your sentiments.

The Court: I will also state that I asked the questions of Mr. Brenner only because I want the record for persons other than myself. So far as I am concerned, I have no doubt as to the integrity of everybody connected with the District Attorney's office, and their use of information with respect to special panels.

Comparative Summary of County Clerk of New York Concerning Jurors

COUNTY CLERK, NEW YORK COUNTY

COMPARATIVE SUMMARY OF ACTIVITIES

The following comparative summary of the operations of the office of the County Clerk, New York County, for the fiscal years 1949-1950, 1950-1951, 1951-1952, 1952-1953, 1953-1954 and 1954-1955 has been issued.

JURORS DIVISION

	1950	1951	1952	1953	1954	1954-55
Division of jurors at end of period:						
Grand Jurors	1,493	1,492	1,686	1,850	1,949	2,000
General Trial Jurors	55,722	56,812	57,583	60,126	58,374	59,652
Special Jurors	2,301	2,204	2,039	1,980	2,025	1,895
Sheriff's Jurors	430	452	453	430	443	446

Records of District Attorney as to Panel of Special Jurors in t Case of People v. Louis B. Saperstein Drawn on June 1, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.

Name	Occupation	Residence	Business Addre
HERBERT L. AARON	MFR.	522 W. END AVE.	15 W. 28TH

J. Excused by Court in 1/4/43—said he was prejudiced—excused Dewey in Hines case—Suggest full inquiry of opinions and ass

4/24/36 Edw. Taylor, et al—Conspiracy—Disagreed—Wallace—Biensta

10/18/39—James Horn—Murd. 1st Deg.—Murd. 1st Deg.—Wallace—Monagh Good—reached verdict in half hour.

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FERDINAND ASCHER BANK CLERK 601 W. 190TH 513 AVE. 5 MFG. TR. CO.

Investigated Report—"will not make good blue ribbon juror" b cause of late years—unable to "grasp things"—can't concentrate worried about invalid son.

11-20-52 Leonardo Salemi—Murder 1st Deg.—Murder 1st Deg.—Goldstein Dermody—Alternate—Excellent

JOSEPH BAME MGR. 11 E. 75TH 46 WALL ST. COMM. NAT. BK.

2/ 6/34—Aaron Schwartz—Murder 1st Deg.—Murder 2nd Deg. (Murder 1st Deg. taken from jury) Rosalsky—Kaminsky—*Intel gent*

4/15/36—Kunay & Santer—1290 Pl—G L 1st Deg. Nott—Markowitz

5/15/41—Wilson & Richardson—Murd. 1st Deg.—Murd. 1st Deg (both Del life rec. for one) Streit—Rivers

6/ 9/47 Harrison—Murd. 1st Deg. Tr. & P. G. Mansl 1st Deg.—Valente Gerbr

10/29/52—Roldan—Murder 1st Deg.—Tr. & P. G.—Murd. 2nd Deg. Ge

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Records of District Attorney as to Panel of Special Jurors in the Case of People v. *Louis B. Saperstein Drawn on June 21, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.*

	Name	Occupation	Residence	Business Address
	JESSE J. BERLIN	INS.	33 RIVERSIDE DR.	45 JOHN ST. H. BERLIN
2/16/43	John Regan—Murd 1°—Murd. 1°—Freschi—Herman			
1/12/48	Chris Mackisch—Murd 1°—Murd 1°—Streit—Liebler			
C	JOHN H. BESSETTE	SPEC. OFFICER	4996 BWAY	72 ST & LEX AV CORN EX BLDG
10/ 7/36	Chas Mugavars Murd 1°—Murd 2° Donnellan—McGuire			
	JOHN V. BEST	AUTO BROKER	780 RIVERSIDE DR	
3/ 1/45	Thomas Levan Murd 1°—Murd 1° No Recom. Donnellan—Herman			
12/ 8/52	Henry Jefferson Murd 1° Trial & Plead Mansl 1° Mullen—Yeargin			
	Juror came into court during trial and was discharged by Court.			
	MORRIS W. BLUMENTHAL	SMAN	390 W END	226 W. 37TH
4/25/52	Wm Vanderwyde Murder 1°—Murder 1° Mullen—Gebrow			
	• • •			
	(a) LINDSEY R. BOYLE	C. P. A.	200 CABRINI BLVD	67 BROAD ST. HASKINS & SELLS
5/27/46	Bernard Richardson—Murd 1°—Tr & P G—Murd 2°Goldstein—Yeargin			
10/29/52	Nestor Roldan—Murder 1°—Tr & P. G.—Murd 2°—Capozzo—Yeargin			
	Good			
	• • •			
	TROWBRIDGE CALLAWAY, JR.	ANALYST	157 E 81	59 WALL ST.
12-21-44	—Wm. Rizzi—Murd 1 Deg—Murd 1 Deg—with recom. Donnellan—Herman			

Records of District Attorney as to Panel of Special Jurors in the Case of People v. *Lousi B. Saperstein Drawn on June 1, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.*

	Name	Occupation	Residence	Business Address
4/25/52	Frank Engel—Conspiracy—Disagreed—Goldstein—Sarajan			
	Excellent			
	• • •			
	Heinrich J. Chadburn	Apt. Hse. Mgr.	145 W 12	
12/11/51	Albert Tassiello—Murd 1 Deg—Disagreed—Goldstein—Herman & Daly			
	• • •			
	David G. Curl	Letter Carrier	1314 Riverside Dr	
5/27/49	Geo. P. Reeh—Murd 1 Deg—Murd 1 Deg—Donnellan—Monaghan Leonard Rosenberg—Murd 1 Deg—Murd 1 Deg with recom (Alternate)			
	Francis T. Curran	Spec. Agt.	788 Rside Dr	59 John St. Continental Casualty
5/ 1/52	—John Policano—Murd 1 Deg—Murd 1 Deg—Goldstein—Yeargin (Alternate)			
	• • •			
	John E. Davis	Asst. Editor	425 E 51	50 W 50 Shell Oil Co.
	Investigator's Report "Leftist Tendencies"—Would have relationship to type of case he sat on, peculiar type of person. Entertains Negroes in his apartment, as result of which his lease in an exclusive apartment will not be renewed.			
5/ 1/52	—John Policano—Murd 1 Deg—Murd 2 Deg—Goldstein—Yeargin			
	Martin Dicker	Prod. Engr	45 Christopher	
12/ 8/50	—Ferdinand Burtone—Murd 1 Deg—Acq.—Goldstein—Liebler & Pagnacco			
	Alternate—Not to be used where there is a confession			
	• • •			

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Records of District Attorney as to Panel of Special Jurors in the Case of People v. *Louis B. Saperstein Drawn on June 1, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.*

Name	Occupation	Residence	Business Address
BERNARD EBERLIN	SALES AGT	929 PARK AVE.	50 CHURCH ST. SUPR. SHEET STEEL CO.

Republican—Born 1895—"O. K. Insufficient Information"

10/14/48—Chas. Hyatt—Murd 1 Deg—Indict Dismissed—Goldstein—Yeargin

10/14/48—Geo Sullivan—Murd 1 Deg—Murd 1 Deg.

4/25/52—Frank Engel—Conspir—Disagreed—Goldstein—Sarajan

Excellent

• • •

NORMAN D. ERLANGER	BOND TRADER	124 E 84	11 WALL ST NELSON ASIEL

4/15/48—Eugene Pannell—Murd 1 Deg—Murd 1 Deg—Donnellan—Liebler

5/ 6/52—Al Keshner—Murd 1 Deg—Murd 1 Deg—No Rec.—Valente—Herman

Jacob Mayron—Acquitted— — — Valente—Herman

Weak

• • •

MYRON S. FALK, JR.	BROKER	17 E 66	115 BWAY R. E. SAMUELS

11/18/48—Dupree, et al.—Murd 1 Deg—Murd 1 Deg—Schuman—Liebler

Good

(F)

HARRY R. FARDWELL	ASST. TREAS. SEC.	26 E 10	260 AVE 11 OTIS ELEVATOR

11/20/52—Leonardo Salemi—Murd 1 Deg—Murd 1 Deg—Goldstein—Dermody

Excellent

E IN CENTER

Records of District Attorney as to Panel of Special Jurors in the Case of People v. *Louis B. Saperstein Drawn on June 1, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.*

Name	Occupation	Residence	Business Address
JOSEPH J. FAY	INS. CLERK	540 W 189	60 E 42 WEST INDIES SUGAR

2/ 4/48—Harris Gray—Murd 1 Deg—Murd 1 Deg—Streit—Monaghan

5/ 1/52—John Policano—Murd 1 Deg—Murd 2 Deg—Goldstein—Yeargin

• • •

WM. H. FORSYTHE, JR. ASST. CURATOR 1105 PARK AVE MET. MUS. ART

3/15/39—John Virga (2 cases) Kidnapping—Conviction both cases Freschi—Rosenblum

Able—Intelligent

12/ 1/42—Mike Peller) Murd 1 Deg—Murd Deg—Wallace—Monaghan
Albert Podinker)

• • •

CHARLES B. FRANKLIN ELEC. ENGR. 59 E 79 138 W 60 GEN. OZONE CO.

1-20-47—Webster Daniel—Murd 1 Deg—Murd 1 Deg—Donnellan—Yeargin

JULES FREEDMAN ADV. 25 E 86 9 E 41 LAWRENCE & GUMBINER

11/20/52—Leonardo Salemi—Murd 1 Deg—Murd 1 Deg—Goldstein—Dermody

Excellent

REUBEN S. FRITZBERG AUDITOR 570 W 189 870 AVE 7 HO. PARK CENTRAL

3/25/46—Leon Webster—Murd 1 Deg—Mansl 1 Deg—Valente—Yeargin

5/ 1/52—John Policano—Murd 1 Deg—Murd 2 Deg—Goldstein—Yeargin

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COPY BOUND C

Records of District Attorney as to Panel of Special Jurors in the Case of People v. *Louis B. Saperstein Drawn on June 1, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.*

Name	Occupation	Residence	Business Address
Samuel C. Goodrich, Jr.	Bus. Mgr.	66 W 55	154 W 56 Dance Players Studio

3/15/45—Fay & Bove—Consp & Extor—Tr & Convic Conspir 1—Munson Extort. 7th Count (JSC) Hogan

1/ 6/50—Ralph Barrows—Murd 1 Deg—Mansl 1 Deg—Streit—Liebler
(Murder 1 Deg & 2 Deg taken from Jury)
Proper Verdict—Very Intelligent Jury

4/25/52—Frank Engel—Consp—Disagreed—Goldstein—Sarajan

Excellent

William R. Goodwin	Elec Engr	421 W 57	117 E 167 NY Tel Co.

12/13/40—James Gallagher—G. L. 1°—G. L. 1°—Wallace—Stickman

6/29/43—Louis Parisi—Murd 1 Deg—Murd 1 Deg—Wallace—Monaghan

5/ 6/52—Al Keshner—Murd 1 Deg—Murd 1 Deg—No Recom.—Valente—Herman

Jacob Mayron—Murd 1 Deg—Acquittal—Valente—Herman

• • •

George M. Grennan	Teller	324 W 22	35 Rock. Pl. Chase Bk.

Born 1897—Democrat—Married. Investigator's Report "In view of possible Irish-Catholic setup, extreme caution and care is urged."

2/14/35—Michael Fallon—Murd 1 Deg—Tr. & P. G.—Murd 2 Deg—Rosalsky—Neary

3/ 4/43—Wm. Walsh) Extortion—Extortion—Mullen—Beneson
Henry Weltzer)

4/20/51—Albert Tassiello—Murd 1 Deg—Disagreed—Valente—Herman & Daly

Good Juror—Alt Juror

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OSE IN CENTER

Records of District Attorney as to Panel of Special Jurors in the Case of People v. *Louis B. Saperstein Drawn on June 1, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.*

Name	Occupation	Residence	Business Address
CLARENCE R. HAYES	SALES MGR	170 E 79	39 BWAY
			BACON, STEVENSON Co

1/31/47—Angelo Tassiello—Murd 1 Deg—Acq—Donnellan—Murphy

REGINALD HEADLEY R. E. BROKER 131 MCDOUGAL ST.

12/23/41—Julian Ross—Murd 1 Deg—Tr & P. G.—Mansl. 1 Deg—Mullen—Monaghan

Geo. S. Hunt—Ind. Idsm. on Motion of D. A.

1/20/52—Leonardo Salemi—Murd 1 Deg—Murd 1 Deg—Goldstein—Dermody

Excellent

EDWARD H. HENKEN MGMT TRAINER 53 VERMILYEA AVE

4/25/52—Frank Engel, et al—Consp. etc.—Disagreed—Goldstein—Sarajan

Excellent

JOHN HERR	SMAN	414 E 52	48 WILLIAM ST.
			R. W. PRESSPRICH

3/24/50—Bernard Stein—Murd 1 Deg—Disagreed—Donnellan—Monaghan

This Juror should definitely be avoided—is not fit to render any proper verdict.

THOMAS J. HICKEY	CLERK	6 W 96

4/20/44—Anthony Renda—Mansl 1 Deg—Mansl 1 Deg—Donnellan—Liebler

5/ 6/52—Al Keshner—Murd 1 Deg—Murd 1 Deg—Valente—Herman

6/ 6/52—Jacob Mayron—Murd 1 Deg—Acq.—Valente—Herman

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COPY BOUN

Records of District Attorney as to Panel of Special Jurors in the Case of People v. *Louis B. Saperstein Drawn on June 1, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.*

Name	Occupation	Residence	Business Address
HARRI B. HOLLIS	STOREKEEPER	746 ST. NICH AVENUE	131 W 135

11/20/52—Leonardo Salemi—Murd 1 Deg—Murd 1 Deg—Nott—Greener

Good Juror

5/ 7/41—Louis Clegg—Murder 1 Deg—Tr & Pl.—Murd 2 Deg—Goldstein—Scotti

10/29/51—Benedicto Moiri—Murd 1 Deg—Acq.—Nott—Herman

FRED K. HOLTERMANN	CORRESPONDENT	607 W 147	30 E 42 LINDE AIR PRODUCTS

Rep.—Married. Investigator's Report "Honest, not strong, Easily swayed—inclined to follow dominant individual". "One track mind, strong convictions". Unsatisfactory type juror. Examined in Hines, case excused by Court.

• • •

JOHN W. ISEMAN	SUPERVISOR	341 E 78	111 BWAY N.Y.S. DEPT OF ED.

4/20 A. Tassiello—Murd 1 Deg—Disagreed—Valente—Herman

Good

• • •

LOUIS E. KARSTEN	JEWELER	9 SICKLES ST.	

5/16/50—Beltram & Walker—Murd 1 Deg—Murd 2 Deg—Goldstein—Yeargin

Capable

LEO A KASS	V. P.	574 W END	51 E 42 BLDG. CHEM. CORP.

3/24/50—Bernard Stein—Murd 1 Deg—Disagreed—Donnellan—Monaghan

Alternate Juror

CLOSE IN CENTER

Records of District Attorney as to Panel of Special Jurors in the Case of People v. *Louis B. Saperstein Drawn on June 1, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.*

Name	Occupation	Residence	Business Address
William D. Kaufmann	Adv.	270 W 11	229 W 43 NY Times

3/ 5/46 Geo. F. Brown—Murd 1 Deg—Murd 2 Deg—Streit—Grumet

Edward C. King	Adv. Production	801 Rside Dr	230 W 41 Herald Tribune

8/ 6/52—Al Keshner—Murd 1 Deg—Murd 1 Deg—No Recom.—Valente—Herman

8/ 6/52—Jacob Mayron—Murd 1 Deg—Acq. — — Valente—Herman

• • •

Michael J. Kirby	Supervisor	152 Dyckman	195 Bway AT&T Co.

12/11/51—A Tassiello—Murd 1 Deg—Disagreed—Goldstein—Herman

Arthur Klauber	Retired	160 W 87	

6/ 2/43—Thos. Wilson—Murd 1 Deg—Tr & Pl.—Assault 1 Deg Streit—River

6/14/51—John Harris—Murd 1 Deg—Murd 1 Deg—with recom.—Goldstein—Gerbrow

Edwin J. Kleiman	Credit Mgr.	69 Payson Ave	2 Park Av Cluett Peabody & Co. Inc.

4/25/52—Frank J. Engel, et al—Conspir, etc.—Disagreed—Goldstein—Sarajan

Excellent

COPY BOUN

Records of District Attorney as to Panel of Special Jurors in the Case of People v. *Louis B. Saperstein Drawn on June 1, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.*

Name	Occupation	Residence	Business Address
DAVID KLEIN	MFR.	168 W. 86	570 BWAY US BRONZE SIGN CO.

2/20/42—Lee E. Wilkes, et al—Murd 1 Deg—Murd 1 Deg—Goldstein—Scotti

Intelligent

7/19/47—Graub & Mange—Murder 1 Deg—Murd 1 Deg—No Recom—Donnellan—Liebler

Excellent

CURTIS L. LEE	CLERK	259 W 29	40 WALL ST. SCHROEDER

3/20/36—Vera Stretz—Murd 1 Deg—Acq.—Colliers—O'Brien

Very Sympathetic & Soft

ELLIOTT LEEDS	SMAN	161 S 75	40 WORTH ST. B. BERNSTEIN TEXTILE CO.

6/ 8/48—Rockwell, et al—Conspir—Convic—Wallace—Beucoube

Good

11/20/52—Leonardo Salemi—Murd 1 Deg—Murd 1 Deg—Goldstein—Dermody

Good

LEO B. LEVIN	RETIRED	161 W 54	

4/27/49—Thos. Caruso—Murd 1 Deg—Murd 1 Deg Recom.—Wallace—Liebler

HENRY K. L. HOMMEDIEU	BONDS	400 E 52	20 PINE ST. WOOD STRUTHERS CO

11/23/42—G. Martinez—Murd 1 Deg—Tr & Pl Murd 2 Deg—Streit—Rivers

5/ 1/52—John Palecano—Murd 1 Deg—Murd 2 Deg—Goldstein—Yeargin

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CLOSE IN CENTER

Records of District Attorney as to Panel of Special Jurors in the Case of People v. *Louis B. Saperstein Drawn on June 1, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.*

	Name	Occupation	Residence	Business Address
J.	EMANUEL N. LONDON	SALES	40 E 88	350 AVE 5 A. L. SIEGEL CO.

O. K. Born 1898

• • •

LEO J. MARX R. E. 522 W END

9/14/40—Geo Scalise—G. L.—Conv.—Schurman—Gurfein

Excellent

2/11/43—Thos. Wright—Murd. 1 Deg—Murd 2 Deg—Donnellan—Rivers
Murd 1 Deg—Taken Away

• • •

CAL. J. MCCARTHY, JR. ADV EXEC 125 E. 84 405 LEX AVE
RUTHRAUF & RYA

5/27/46—B. Richardson—Murder 1 Deg—Tr & Pl—Murd 2 Deg—Goldstein—
Yeargi

EMORY L. MCCREARY R. E. & BANKING 213 E 60

Served as Fed Grand Juror

11/23/42—G. Martinez—Murd 1 Deg—Tr. & Pl.—Murd 2 Deg—Streit—River

• • •

HARRY G. MORSE DIAMONDS 112 C. P. SOUTH 7 W 45

12/12/45—Archbishop Tyarbs, et al—Conspir—Convic—Wallace—Newcomb

7/ 1/48—S. Bretogne, et al—Murd 1 Deg—Murd 1 Deg—Streit—Monaghan

Alternate

4/25/52—W. Vanderwyde—Murd 1 Deg—Murd 1 Deg—Mullen—Grebrow

COPY BOUN

Records of District Attorney as to Panel of Special Jurors in the Case of People v. *Louis B. Saperstein Drawn on June 1, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.*

Name	Occupation	Residence	Business Address
Francis R. Murray	Repr	5 Stuyvesant Oval	435 W 50 NY Tel Co.

Jerry Jerome, et al—Conspir, etc.—Convic—Mullen—Scotti

Alternate and Very Intelligent

Joseph M. Murphy	Agent	240 E 79	135 E 42

O. K. Born 1888—Single Democrat

11/28/34—Jos. Pubriare—Murd 1 Deg—Acq.—Colliere—Kaminsky

12/10/42—B. DeJesus, et al—Murd 1 Deg—Murd 1 Deg—Wallace—Grumet

Donald V. Newhall	Artist	130 E 67	

Retired—A man of means, quite reserved and undemocratic Deep Thinker and Intelligent

1/15/43—Benj. Grogan—Murd 1 Deg—Tr & Acq.—Donnellan & Rivers
By Direction

Carmen N. Olivelli	Dept. Store Exec	610 Academy St.	R. H. Macy & Co.

4/25/52—Frank Engel, et al—Conspir, etc.—Disagreed—Goldstein—Sarajan

Excellent

Harold O. Parker	Clerk	608 W 188	708 First Av Con. Edison

2/26/45—Geo. F. Bartell—G. L. 1 Deg.—G. L. 1 Deg—Shurman—Hunter

Excellent

5/ 1/52—John Palecari—Murd 1 Deg—Murd 2 Deg—Goldstein—Yeargin

CLOSE IN CENTER

Records of District Attorney as to Panel of Special Jurors in the Case of People v. Louis B. Saperstein Drawn on June 1, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.

Name	Occupation	Residence	Business Address
JACK PERL	EXEC	325 W 86	450 AVE 7
			NAITOVE FACTORS

4/20/52—Leonardo Salemi—Murd 1 Deg—Murd 1 Deg—Goldstein—Yeargin

Excellent

GEORGE T. RAYNER	BANK CLERK	309 E 48	16 WALL ST
			BANKERS

1/31/46—Johnny Jones—Murd 1 Deg—Acq.—Goldstein—Yeargin

HOWARD M. REALE	EXECUTIVE	1065 LEX AVE	552 W 125
			METRO

5/17/47—Marciano Abella—Murd 1 Deg—Murd 2 Deg—Wallace—Monaghan

JOHN G. REEL	R. E.	316 W 70	2672 BWAY

3/20/40—Pablo Gonzales—Murd 1 Deg—Murd 2 Deg—Streit—Monaghan

Verdict proper—Juror high type

ROBT. P. REICHENBACH	SECURITY ANALYST	26 E 91	1 WALL ST INST. UTILITY SER.

1/20/47—Webster Daniel—Murd. 1 Deg—Murd 1 Deg—Donnellan—Yeargin

4/25/52—Wm. Vanderwyde—Murd 1 Deg—Murd 1 Deg—Mullen—Grebrow

WALTER E. RITTER	PAYMASTER	135 W 225	WALDORF-ASTORIA

6/15/34—Jack Zaroff—Murd 1 Deg—Disagreed—Corrigan—Kaminsky

O. K.

6/27/35—Jos. McMurrough—Mansl 1 Deg—Mansl 1 Deg—Nott—Carney

Remarks—WALTER E. RITTER—*Case*—Bribery and unlawful fees

Verdict—Guilty—"All appeared to be excellent type of jurors, followed testimony carefully while kept for seven weeks. Has no objection to draw inferences from circumstantial evidence."

COPY BOUN

Records of District Attorney as to Panel of Special Jurors in the Case of People v. *Louis B. Saperstein Drawn on June 1, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.*

Name	Occupation	Residence	Business Address
Fred J. Roeben	Chem. Engr.	90 Bond St.	4 Irving Pl Con Edison

3/24/ Bernard Stein—Murd 1 Deg—Disagreed—Donnel. n—Monaghan

S. Harold Rohman	Stockbroker	71 W 12	61 Bway RH Kaufman, A & Co.

"Excellent" Offense Manslaughter First and Second—Convicted Both Counts

3/26/25—Saml Bliche—Arson 2 Deg—Disagreed—Nott—Aurelio

6/28/29—I. Knopper—Murd 1 Deg—Murd 2 Deg—Mulgreen—McDonald

Jack L. Rosenberg	R. E. Sman	203 W 81	342 W 14 Jos. Isaacs & Sons

4/25/52—Wm. Vanderwyde—Murd 1 Deg—Murd 1 Deg—Mullen—Grebrow

George M. Rosenfeld	Paper	1133 Park Av	7 University Place Richard Bauer

3/ 1/45—Thos. Levan—Murd 1 Deg—Murd 1 Deg—No. Recom—Donnellan—Herman

• • •

Arthur B. Schlesinger	Merchant	400 W End	1571 Bway Leighton Inc.

5/22/49—Reeh & Rosenberg—Murd 1 Deg—Murd 1 Deg—Donnellan—Monaghan

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CLOSE IN CENTER

Records of District Attorney as to Panel of Special Jurors in the Case of People v. *Louis B. Saperstein Drawn on June 1, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.*

Name	Occupation	Residence	Business Addres
P. Charles S. Scholen	Statistician	10 Tieman Pl	65 Bway Moodys

O. K. Lack of Substance

6/14/45—Wm. Keith—Murd 1 Deg—Murd 2 Deg—Sullivan—Yeargin

Proper Verdict

5/16/50—Beltram & Walker—Murder 1 Deg—Murd 1 Deg—No Recom Go stein—Year

Ralph C. Scott	Banking	687 Lex Ave	33 Liberty Fed. Reserve

11/17/42—John W. Brown—G. L. 1 Deg—G. L. 1 Deg—Goldstein—Hun

5/16/50—Beltram & Walker—Murder 1 Deg—Murd 1 Deg—No Recom. Go stein—Year

Capable

• • •

Herman Shaublin	Elevator Operator	2 Adrian Av	55 Broad St Mfg. Tr. Co

1/27/37—Kross—Krane—Extort—Extort—Nott—Kumegan

12/20/40—D. Garrett—Murd 1 Deg—Murd 1 Deg—Kreschi—Sarajan

Herman C. Shepard	Engr	244 W 11	140 West St AT&T

1/31/47—A. Tassiello—Murd 1st Deg—Acq.—Donnellan—Murphy

4/25/52—Frank Engel—Conspir—Disagreed—Goldstein—Sarajan

Excellent

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Records of District Attorney as to Panel of Special Jurors in the Case of People v. *Louis B. Saperstein Drawn on June 1, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.*

Name	Occupation	Residence	Business Address
Benjamin N. Smith Sr. Clerk		501 W 189	4 Irving Pl Con Edison

4/25/52—Frank Engel—Conspir—Disagreed—Goldstein—Sarajan

Alternate—*Excellent*

• • •

E. Ralph Sterling Analyst 42 W 9

6/ 2/39—Lulu Santora—Murd 1 Deg Acq.—Koenig—Herman

Sympathy—Verdict

• • •

William R. Sterritt Engr 825 W 187th 140 West St NY Tel Co.

10/29/51—Benedicto Macri—Mansl. 1 Deg—Acq. Streit—Herman

John Storm Asst. Sales Mgr 34 Hillside Av 4947 Bway Prud Ins. Co.

12/15/43—A. Jackson—Murd 1 Deg—Tr & Pl.—Murd 2 Deg—Streit—Yeargin

11/27/46—Jos F. Greenwood, etal—Murd. 1 Deg Tr & Pl Murd 2 Deg—Donnellan Liebler

Ada F. Sydney R. E. 172 W. 79

Served on Federal Grand Jury

George N. Taube Importer 465 Lex Ave

Judge said Jury He Sat on Unsatisfactory—Miscarriage of Justice

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Records of District Attorney as to Panel of Special Jurors in the Case of People v. Louis B. Saperstein Drawn on June 1, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.

Name	Occupation	Residence	Business Address
GEORGE N. TAUBE	IMPORTER	465 LEX AVE	

6/ 9/39—Vincent E. Territti, et al—1290 P. L. etc Acq—Streit—Ten Eyck

The 12 jurors should be avoided.

5/ 1/52—John Policani—Murder 1 Deg—Murd 2 Deg—Goldstein—Yeargin

ROBERT B. THORPE	EDUCATOR	601 E 20	47 BEAVER ST.
			AM. CANCER SOC., INC.

11/20/52—Leonardo Salemi—Murd 1 Deg—Murd 1 Deg—Goldstein—Dermody

• • •

FRANCIS J. TRACY	INS. CLERK	200 DYCKMAN	34 NASSAU ST
			MUTUAL LIFE

3/ 5/46—Geo I. Brown Murd 1 Deg—Murd 2 Deg—Streit—Grumet

A. ROBERT TREMAINE	INS.	321 AVE C	99 JOHN ST.
			CARPENTER & BAKER

5/28/51—Leonard Rosenberg—Murder 1 Deg.—Acq—Cupozzoli—Herman

JOHN A. TRENT	INS. AGT.	100 COOPER ST.	2315 BWAY
			MET LIFE INS. CO

4/25/52—Wm Vanderwyde—Murd 1 deg—Murd 1 Deg—Mullen—Gerbrow

ERNEST TRIBELHORN, JR.	R. E.	336 W END AV	2067 BWAY

2/25/13 Disorderly House—25 days City Prison and $500.
O. K.—Drinks to excess at times.

COPY BOUND

Records of District Attorney as to Panel of Special Jurors in the Case of People v. *Louis B. Saperstein Drawn on June 1, 1954, for Service in Part VIII Court of General Sessions June 21, 1954.*

Name	Occupation	Residence	Business Address
Leo Weil	Lamp Bulbs	124 W 79	Schwin

Man of Means

6/25/48—Gus Fussaro—G. L. 1 Deg—G L 1 Deg—Schwin—Clark

• • •

John H. Wilhelm	Repr	25 E 54	570 Lex Ave Western Union

11/17/48—Julio Perez—Murd 1 Deg—Murd 1 Deg—Donnellan

Excellent

Alfred M. Williams	Sales	130 E 39	1330 Bway Tiny Town Togs

3/ 6/39 L. Burno—Murd. 1 Deg Tr Pl—Mans. 1 Deg—Streit—Monaghan

5/ 6/52 Al Keshner—Murd 1st Deg—Murd 1 Deg—No Recom—Venente—Herman

5/ 6/52 Jacob Warren—Murd 1 Deg—Acq. — — Valente—Herman

Alternate—Weak

Melvin E. Wilson	Acct	101 Cooper St.	230 Park Ave. D & H R.R.

6/11/41—Jos. Mucher, et al—Murd 1 Deg—Tr Pl. Murder 2 Deg—Streit—Herman

4/25/52—Wm. Vanderwyde—Murder 1 Deg—Murder 1 Deg—Mullen—Gebrow

Thaddeus W. Wright	Broker	55 E 10	

11/20/52—Leonardo Salemi—Murder 1 Deg.—Mur 1 Deg—Goldstein—Dermody

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Opinion of Appellate Division on Related Appeal

The People of the State of New York, Respondent v. *Louis B. Saperstein, Appellant.*—Judgment of conviction and order, rendered on January 23, 1956, resentencing defendant unanimously vacated on the ground that, in the absence of both defendant and his attorney, there was no authority to alter the judgment and sentence rendered and imposed July 30, 1954 (Code Crim. Pro., Secs. 356, 473), and the action is remitted to the Court of General Sessions for resentencing or such other proceedings which may be appropriate. Concur—Breitel, *J.P.*, Rabin, Cox, Frank and Bastow, *JJ.*

Extract From Stenographer's Minutes— January 23, 1956

(Re: Suspension of Sentence on Latter Four Counts of Indictment)

"The Court: Mr. Scotti, apparently, and according to the record, I did sentence Saperstein on July 30th under his conviction on each of the five counts charging criminal contempt, under Indictment No. 1663 of 1954, to one year in the Penitentiary, such sentences to run consecutively to each other.

Because of your recommendation, and because I am in accord with the principle contained in your recommendation, I shall suspend the execution of the sentences imposed under the 2nd, 3rd, 4th and 5th counts of the indictment, so that at the present time the sentence will stand on the first count of the indictment, which was one year in the Penitentiary. The other four sentences of one year each shall be suspended, as to their execution.

Reginald C. Mershon,
Off. Steno."

Office - Supreme Court, U.S.
FILED
APR 16 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. 857 [redacted].

LOUIS B. SAPERSTEIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

This is a petition for a writ of certiorari to the Court of Appeals of the State of New York, to review an order of that court, entered January 10, 1957, unanimously affirming, with opinion per DESMOND, J. (2 N. Y. 2d 210; see Appendix to Petition, p. 1a*), an order of the Appellate Division, First Department, of the Supreme Court of the State of New York (1 App. Div. 2d 402, see 3724-31**)

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* Hereinafter referred to as "appendix".

** References, unless otherwise indicated, are to folios of the printed record on appeal to the New York Court of Appeals.

entered April 24, 1956, unanimously affirming a judgment of the Court of General Sessions, New York County, rendered July 30, 1954, which convicted the petitioner of five crimes of CONTEMPT OF COURT (N. Y. Penal Law, §600), after a trial before MULLEN, J. and a special jury. The petitioner was sentenced to five consecutive terms of one year each in the New York City Penitentiary (109, 3675-7).

On January 23, 1956, the Court of General Sessions (MULLEN, J.) suspended execution of all but the first term of the sentence (see appendix, p. 93-a). This action of the trial court was vacated by the Appellate Division, First Department, in a separate order entered April 24, 1956, which noted that it had been taken in the absence of the petitioner and his attorney (1 App. Div. 2d 949, see 3723), and remitted the matter to the Court of General Sessions for resentencing or other appropriate proceedings (3718-21).

No further action has been taken by the Court of General Sessions pursuant to the above order, and the petitioner is presently at liberty on bail.

Introduction

From November 24, 1953, up to the time of the petitioner's trial, an investigation was being conducted before the fourth grand jury impaneled in the Court of General Sessions, New York County, for the November term, 1953. This investigation sought to determine whether insurance agents had conspired with labor union officials and others

to split commissions received on life, health and accident insurance, placed on behalf of union members, in violation of the Insurance Law and Penal Law of New York (344-5).

In particular, during the course of the investigation, the grand jury sought to ascertain if the petitioner, an insurance agent in Newark, New Jersey, had so conspired and whether, as part of the conspiracy, one George Scalise had been instrumental in getting business for him; whether Scalise had thereby benefited financially and had an interest in the petitioner's business; and whether he had instructed, ordered or directed the petitioner in the conduct of his business (345-8).

The petitioner was called as a witness before the above grand jury, pursuant to the reciprocal witness statute (N. Y. Code Crim. Proc. §618-a; N. J. Stat. Ann. 2A: 81-18 et seq.). On May 9, 1954, the second of the petitioner's five appearances before the grand jury, he was granted full state immunity [1524-6; see N. Y. Penal Law, §2447; *People* v. *Breslin* (1954) 306 N. Y. 294].

At his appearances therefore on March 2 and 9, 1954, he testified among other things, that he was friendly with Scalise, but that Scalise had never helped him get union insurance business and had no interest in his insurance agencies or corporations, of which the petitioner had several; and that he had never discussed any union account with Scalise so far as he could recall (1082-5, 1090-4, 1262-6, 1545-6, 1551-3, 1559-60, 1564, 1619-20).

At the petitioner's appearance on March 11 and 15, 1954, certain recordings, purportedly of intercepted telephone

conversations between the petitioner and Scalise in 1952, were played back to him and he was asked if he had participated in them. Five of these conversations, the ones underlying the five counts in the indictment, purported to reveal the petitioner discussing with a person addressed as "George" the acquisition of labor union insurance business and the details of negotiation with respect thereto, in language clearly exhibiting a community of interest between them and, in fact, frequently including directions or orders given by "George" to the petitioner. These conversations are summarized in the indictment, and were played back at the trial, as indicated in the following table:

Date of Conversation	*No.*	*Folios in Indictment*	*Folios of Playback*
Nov. 7, 1952	3	60-3	2294-304
Nov. 7, 1952	2	43-6	2337-46
Nov. 8, 1952	4	76-7	2417-22
Nov. 14, 1952	1	25-30	2054-100
Nov. 17, 1952	5	90-2	2254-9

The petitioner repeatedly refused to answer, either surely or with reservation, whether he had participated in these conversations. He claimed a total lack of recollection, which, he said, was not restored either by the fact that, in some instances, the voices sounded like his and Scalise's (2120-6, 2130, 2133-5, 2139, 2145, 2154-5, 2260-2, 2265-7, 2309, 2315, 2327, 2456) or that parts of some of the conversations sounded familiar (2123-6, 2130-3, 2136-8, 2148-51, 2154-66, 2270-8, 2307-9, 2313, 2368, 2370, 2381-5,

2387, 2432-8). The petitioner's evasion and claim of amnesia were found to be contumacious, and no contention is now made to the contrary (see petition, p. 4).

On May 13, 1954, the petitioner was indicted by the above grand jury for Contempt of Court (13-96).

A motion for a special jury was granted by the Court of General Sessions (MULLEN, J.) on May 26, 1954 (106-7; see appendix, pp. 55a-59a). The trial commenced on June 21, 1954 and concluded with a verdict of guilty on July 2, 1954 (121-3, 3579-88).

The evidence at the trial, besides the transcript of the petitioner's testimony before the grand jury, consisted of the testimony of the grand jury foreman, secretary and stenographers, and of a deputy clerk of the court, showing the legality of the grand jury investigation, the propriety of its proceedings, and the relevancy of the examination of the petitioner.

The petitioner offered no defense, resting on his case at the conclusion of the People's evidence (3023, 3117).

The petitioner now contends (petition, pp. 8-17, 18-22), as he did in the state courts, that the Fourteenth Amendment precluded requiring him to testify about the recorded telephone conversations; that the state wiretapping laws are invalid because they conflict with the Federal Communications Act (Title 47, U. S. Code, §§501, 605), and because they violate the Fourteenth Amendment; and, finally, that the trial before a special jury denied him due process and equal protection of the laws.

ARGUMENT

The petition raises no substantial question warranting review by this Court.

(a) Concerning sections 501 and 605 of the Federal Communications Act

Of the four questions presented in the petition (pp. 2-3), all but the last are part of a long and tenuous argument through which the petitioner seeks to invoke the Federal Communications Act against the instant conviction.

Because section 605 of the Act prohibits the interception and divulgence of communications without authorization by the sender, and violation thereof is made a crime by section 501, the petitioner concludes that these sections: (a) conflict with, and therefore, under the Supremacy Clause, preclude New York's provisions for wire tapping by court order (petition, pp. 14-15), (b) grant a party to an intercepted telephonic conversation a "privilege", within the Privileges and Immunities Clause, not to have such conversation disclosed, in any manner whatsoever, which the New York wire tapping provisions would violate (*id.*, pp. 16-17), (c) require the petitioner—under penal sanction—to refuse to give the evidence sought herein by the grand jury, because in so doing he would be divulging intercepted communications (*id.*, pp. 8-9, 11-12, 14); and, therefore, (d) render unconstitutional any attempt by New York to compel such testimony (*id.*, pp. 12-14).

From this summary of the petitioner's contentions, it is apparent that his argument is premised upon a novel interpretation of the scope and effect of these provisions

of the Federal Communications Act, heretofore unsupported by court decision.

In the first place, this Court has already held that no conflict exists between the aforementioned section 605 and section 813-a of the New York Code of Criminal Procedure, authorizing wire tapping by court order [*Stemmer* v. *New York* (1949) 336 U. S. 963, reh. den. 337 U. S. 921], since Congress did not intend, by the enactment of section 605, to preclude the exercise of the states' police power in this field [*Schwartz* v. *Texas* (1952) 344 U. S. 199, 202-203].

Secondly, it is apparent that the question of the validity of New York's wire tapping laws is only remotely related to issues in the instant case, involving a refusal to testify before a grand jury. As the court below observed (2 N. Y. 2d 210, 216; appendix, p. 5a):

> "• • • the only wire tapping question we have before us here is as to whether this defendant had any valid excuse for refusing to give testimony identifying the voices in recordings of wire taps made by other persons, of conversations in which the defendant took part."

The petitioner seeks to justify his conduct before the grand jury by asserting that, if he had given the testimony requested, he would have become "a party to and an instrument in the divulgence by the state officers of the intercepted communications", thereby violating section 605 of the Communications Act, and exposing himself to a prosecution under section 501 thereof (petition, pp. 9, 11-12, 13-14).

This extreme proposition is not supported by the decisions cited by the petitioner (petition, pp. 8, 12, 17-18), most of which involve the unrelated question of the use of wire tap evidence at a criminal trial in a Federal court.

Moreover, the proposition depends upon a stretching of the rules of vicarious criminal liability far beyond their usual application. In this regard, it must be remembered that the petitioner's appearance before the grand jury was not voluntary, but under compulsion of subpoena, and the telephone conversations concerning which he was questioned had been intercepted and recorded by police officers without either his knowledge or consent. Furthermore, the recordings of these conversations had, in each instance, already been played back to the grand jury *verbatim* before the petitioner was questioned in regard thereto. The sole purpose of questioning the petitioner was to obtain definite confirmation of what the grand jury undoubtedly had surmised from listening to the recordings, namely, that the conversations were between the petitioner and George Scalise and related to the latter's efforts to use the petitioner as a conduit for getting money out of union welfare funds into his own pockets.

Under the circumstances, it is far-fetched to claim that the petitioner's act of answering these grand jury questions would have constituted a prohibited "interception" or "divulgence", punishable under the Federal Communications Act. As the petitioner admits (petition, p. 12):

> "Unquestionably, a witness may testify as to his own independent recollection of a telephone conver-

sation or as to what he overheard by means other than interception * * *"

New York's action in seeking to compel such testimony, upon a grant of immunity, would manifestly not deny the petitioner "the fundamental justice and fairness implicit in the Due Process Clause" (*id.*, p. 14).

In another facet of his argument, the petitioner asserts (petition, pp. 16-17) that he was privileged, as a party to an intercepted telephone conversation, to refrain from testifying in regard thereto, and that this privilege was protected by the Privileges and Immunities Clause of the Fourteenth Amendment.

This contention is apparently based upon an excerpt taken out of context from *United States* v. *Polakoff* (C. C. A. 2d, 1940) 112 Fed. (2d) 888, 889, cert. den. 311 U. S. 653, which presents that court's view that each party to a telephone conversation has an independent right—there referred to as a privilege—not to have the conversation intercepted. Neither that case nor any other known to us supports the petitioner's contention that, as a party to a telephone conversation, he acquired any privilege—still less, one protected by the Fourteenth Amendment [see *Twining* v. *New Jersey* (1908) 211 U. S. 78, 97-99]—not to testify about it because it had been intercepted.

Moreover, implicit in the defendant's theory that he was privileged not to reveal the contents of an intercepted telephone conversation in which he participated, is recognition that he would not be so privileged as to an unintercepted one. Yet, no reason is apparent or suggested for

such a distinction. Even if sought to be predicated on some supposition that wiretaps should not be used, as in this case, as a lever for extracting testimony about one's conversation, the attempted distinction would still fail. If an individual has no privilege against the use of wiretaps of his conversations to send him to prison (*Schwartz* v. *Texas, supra*), *a fortiori,* he has no privilege against their being used to elicit his testimony as a witness.

In the *Polakoff* case, *supra,* the court held that, for wiretap evidence to be admissible in a Federal court, both parties to the communication must have consented to the interception. Because this ruling conflicts with decisions of some of the other United States Courts of Appeals (see cases cited in petition, p. 18), the petitioner advances this as an additional reason for granting certiorari (petition, pp. 17-18).

However, since none of these decisions is at all in point with the instant case, it need only be observed that this is not a proper occasion for this Court to resolve the above conflict.

(b) Concerning the use of a special jury

The petitioner urges his trial by a special jury as a basis for the granting of certiorari (petition, pp. 18-22).

Although the constitutionality of New York's special jury statute (N. Y. Judiciary Law, §749-aa) has been upheld by this Court [*Fay* v. *New York* (1947) 332 U. S. 261; *Moore* v. *New York* (1948) 333 U. S. 565], the petitioner seeks to distinguish these decisions by virtue of a showing,

in the instant case, that the District Attorney's Office of New York County had compiled records containing information about members of the special jury panel for trial use in the selection of juries (petition, pp. 18-19).

The pertinent facts are set forth below.

The special panel comprises about 2000 jurors, drawn from a general panel of about 60,000 (see appendix, p. 73a). While the record herein does not disclose precisely how many of these jurors are subjects of comment in the district attorney's files, the fact that there were 55 folders with respect to the 150 jurors drawn for this case (2622) might be taken as a rough indication that the proportion is about one third.

The folders (Peo. Exh. 13 for ident.; 2639) contained information on the jurors from the observations of trial assistants, from newspaper articles, and, in many cases, from reports prepared by investigators of the District Attorney's Office—none of which reports was more recent than 1947, this practice having been discontinued. This information, occasionally accompanied by terse comments, related to the individual juror's background, including such matters as marital status, financial condition, sobriety, reputation, and intelligence, his past jury service, and his prejudices, eccentricities, and the like.

There were also cards on some of these jurors in the files of the Homicide Bureau (2623-4). The information on these cards, compiled by trial assistants, consisted solely of a record of the particular individual's prior jury service and brief comments by the assistant as to his fitness as a juror (see 2916-22).

Some two weeks prior to the trial, upon motion of the petitioner and with the full acquiescence of the People, the court ordered that all of the district attorney's information concerning the jury panel be made available to the defense (see 2621-33, petition, p. 20). This was done, and there is no claim that any item of information in the prosecution's possession was not open to inspection by the petitioner (2627, 2633-4, 2640-2, 2925-6).

Parenthetically, it should be noted that the material contained in the appendix on the individual jurors (pp. 74a-91a) is not an exact transcript of, but apparently a collation of information derived from, the aforementioned cards and folders. The folders themselves, and photostatic copies of the cards, were submitted to the New York Court of Appeals on the argument of the appeal below, and are available should this Court desire to see them.

The petitioner's contention—urging unconstitutionality of the special panel because of the information compiled by the district attorney—is essentially the same argument that was repeatedly made before this Court in the *Vanderwyde* cases [*Vanderwyde* v. *New York* (1953) 345 U. S. 959, 1004 (cert. petition, pp. 9-10, 14-15; reh. petition, pp. 6-8); *Vanderwyde* v. *Denno* (1954) 347 U. S. 949, 971 (cert. petition, pp. 19-21, reh. petition, p. 5)].

Insofar as this argument concerns due process, it is not, basically, an attack upon the special jury system as such. Rather, it amounts to a contention that any jury panel is unfair to the point of unconstitutionality if the local prosecuting authorities have obtained information concerning a substantial percentage of the jurors.

In short, this reasoning is just as applicable to a similarly investigated general panel of 2000 jurors outside New York City as to the special panel of 2000 here in issue. In counties with small jury panels, the obtaining of such information would probably be easier, and the coverage more complete, than in New York City. Indeed, in rural communties, the prosecutor is doubtless personally acquainted with most of the jurors.

Assuming that the possession of such information would confer an advantage on the prosecution, such advantage was not present in the case at bar. Every scrap of information concerning the talesmen who had been investigated was as available to the defense as it was to the People. Thus, the prosecution, needing the unanimous votes of the twelve jurors to be selected, had no more information about the trial panel than the petitioner, who needed the vote of only one juror to prevent a conviction.

To maintain his claim of a denial of equal protection in the instant case, the petitioner is forced to contend vehemently that, in spite of the possession of all of the prosecution's information on the jurors, he was still at a disadvantage. This argument (petition, pp. 19-21), which was never advanced in the trial court, is based almost entirely upon speculation and hyperbole.

It need only be observed, in this regard, that there is not a shred of evidence in the record that the jurors—who, of course, would never be contacted personally (see N. Y. Penal Law §376-a, petition, pp. 30-31)—were investigated prior to the trial or were aware they had been investigated in the past. Nor is there evidence that the petitioner was

in the least manner dissatisfied with, or uncertain about, the information furnished him as to any particular juror (see 2621-47, 2912-28).

Under the circumstances, there is no showing of unconstitutionality in the instant case such as to warrant any deviation from the rulings in the *Fay* and *Moore* cases, *supra*.

(c) Concerning the manner in which the proceedings were instituted

We agree with the petitioner that he might possibly have raised all the questions here presented by appeal rather than certiorari [Title 28, U. S. Code, §1257; see *Flournoy* v. *Weiner* (1944) 321 U. S. 253, 263 (petition, p. 22)].

We cannot agree, however, with the petitioner's assertion (petition, p. 22) that this fact in any way adds to the merit of the instant petition, on the theory that this Court would have had to assume jurisdiction had the proceedings been instituted by appeal. If the decision of the State court on the Federal questions presented for review by appeal is clearly in line with prior decisions of this Court, —as we believe is the case as to both the wire tapping and special jury aspects of the petition—the petitioner would have no "right" that the appeal be entertained [see *Spies* v. *Illinois* (1887) 123 U. S. 131, 164; see, also, *Equitable Life Assurance Society* v. *Brown* (1902) 187 U. S. 308, 314-315].

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1957